EDITOR'S NOTE

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No. 86-737-CFX Title: James P. McKelvey, Petitioner
Status: GRANTED v.
Thomas K. Turnage, Administrator of Veterans' Affairs, et al.

Docketed:
November 5, 1986 Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
86-622 Counsel for petitioner: Teel,Keith A.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Nov 5 1986	G	Petition for writ of certiorari filed.
3	Dec 4 1986		Order extending time to file response to petition until January 4, 1987.
4	Jan 5 1987		Order further extending time to file response to petition until February 3, 1987.
5	Feb 4 1987		DISTRIBUTED. February 20, 1987
6	Feb 4 1987		Order further extending time to file response to petition until February 17, 1987.
7	Feb 17 1987		Brief of respondent Turnage, Adminr., etc. in opposition filed.
8	Feb 18 1987		REDISTRIBUTED. March 6, 1987
10	Mar 4 1987	X	Reply brief of petitioner James McKelvey filed.
11	Mar 9 1987		Petition GRANTED. The case is consolidated with 86-622, and a total of one hour is allotted for oral argument. Justice Scalia OUT.
			**********
13	Mar 13 1987		Order extending time to file brief of petitioner on the merits until May 14, 1987.
14	Apr 15 1987		Order further extending time to file brief of petitioner on the merits until May 28, 1987.
15	May 28 1987		Brief amicus curiae of Vietnam Veterans of America filed. VIDED.
16	May 28 1987	N	Motion of American Medical Assn. for leave to file a brief as amicus curiae filed.
17	May 28 1987		Brief amicus curiae of Natl Council on Alcoholism filed. VIDED.
18	May 28 1987		Joint appendix filed. VIDED.
20	May 28 1987		Brief of petitioner James McKelvey filed. VIDED.
27	May 28 1987		Brief amici curiae of American Medical Assn., et al. filed.
19	Jun 12 1987	D	Motion of petitioners for divided argument filed.
21	Jun 22 1987		Motion of petitioners for divided argument DENIED. Justice Scalia OUT.
22	Jun 22 1987		Record filed.
24	Jul 1 1987		Order extending time to file brief of respondent on the merits until July 31, 1987.
25	Jul 31 1987		Order further extending time to file brief of respondent on the merits until August 7, 1987.
26	Aug 6 1987		Brief of respondent Turnage, Adminr., etc. filed. VIDED.
28	Oct 9 1987		CIRCULATED.
29	Oct 9 1987		SET FOR ARGUMENT. Monday, December 7, 1987. This case is consolidated with case No. 86-622. (4th case) (1 hr)

No. 86-737-CFX

Entry	Date	Note	Proceedings and Orders
30	Nov 27 1987	X	Reply brief of petitioner James McKelvey filed. VIDED.
31	Dec 7 1987		ARGUED.

Supreme Court, U.S.
FILED
NOV 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES P. MCKELVEY,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, AND VETERANS' ADMINISTRATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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November 5, 1986

QUESTION PRESENTED

Whether a regulation of the Veterans' Administration that conclusively defines alcoholism as willful misconduct, and which was applied to prevent petitioner, an alcoholic, from obtaining an extension of time in which to use educational benefits, when such extensions were available to veterans who suffered from other disabilities, discriminates against the handicapped in violation of section 504 of the Rehabilitation Act of 1973.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-

JAMES P. MCKELVEY,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, AND VETERANS' ADMINISTRATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

James P. McKelvey petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The majority and dissenting opinions of the Court of Appeals (App., *infra*, 1a-31a) are reported at 792 F.2d 194 (D.C. Cir. 1986). The opinion of the District Court (App., *infra*, 32a-47a), which was reversed by the Court of Appeals, is reported at 596 F.Supp. 1317 (D.D.C. 1984).

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1986. (App., *infra*, 48a.) Petitioner's timely motion for rehearing and rehearing *en banc* was denied on August 7, 1986, with four judges of the D.C. Circuit voting

to grant *en banc* rehearing. (App., *infra*, 49a, 50a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

Time limitations for using veterans' educational benefits are established by 38 U.S.C. § 1662(a)(1) (1982), which provides in pertinent part:

> "No education assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall . . . be granted an extension of the applicable delimiting date for such length of time as the Administrator determines, from the evidence, that such veteran was so prevented from initiating or completing such a program of education."

The Veteran's Administration regulation at issue, codified at 38 C.F.R. § 3.301(c)(2) (1986), provides:

> "The simple drinking of alcoholic beverage is not itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or

> death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin."

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), provides in pertinent part:

> "No otherwise qualified handicapped individual in the United States, as defined in § 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive Agency . . . ."

STATEMENT OF THE CASE

James P. McKelvey is an alcoholic.

On September 9, 1963, Mr. McKelvey enlisted in the United States Army. During his enlistment, he received several disciplinary sanctions, all drinking-related. Mr. McKelvey was honorably discharged from the Army on or about September 9, 1966, and was thus entitled to the benefits of the GI Bill, including educational benefits. 38 U.S.C. § 1661 (1982). In the nine years after his honorable discharge, Mr. McKelvey was hospitalized repeatedly for alcoholism and related problems. (App., *infra,* 4a.) Between hospitalizations, Mr. McKelvey attended two educational institutions, using veterans' benefits. He was unable to complete his education because of the debilitating effects of his alcoholism.

Mr. McKelvey had his last drink of alcohol in May 1975. (App., *infra*, 4a.) He subsequently received regular psychiatric treatment. He has been employed on a full-time basis since July 1975, and has worked during the past nine years as an alcoholism counselor.

On September 10, 1976, the ten year delimiting date for use of Mr. McKelvey's educational benefits passed. In 1977, pursuant to 38 U.S.C. § 1662(a)(1) (1982), he sought an extension of that delimiting date on the ground that his alcoholism had prevented earlier use of his benefits in full. (App., *infra*, 4a.) His request was denied by the Veterans' Administration ("VA"), which determined that Mr. McKelvey's disability had resulted from "willful misconduct" which, under the statute, precluded such an extension; the VA's determination was based exclusively upon a regulation that conclusively defines alcoholism as "willful misconduct." 38 C.F.R. § 3.301(c)(2) (1986) ("the willful misconduct regulation").

Mr. McKelvey appealed the VA's decision. In July 1980, at the Board of Veterans' Appeals hearing on Mr. McKelvey's case, the Chairman stated:

> "I want to make one thing clear . . . I am aware of the medical disagreement about what kind of an animal alcoholism is. As far as we are concerned at the Board of Veterans' Appeals, *we don't have discretion to say that primary alcoholism is a disease*. It is defined in the regulations as willful misconduct and whether we want to call it a disease or not, we have no authority to do that, we are bound by those regulations . . . ."
>
> Transcript of Administrative Hearing, July, 1980, quoted in part at 596 F. Supp. 1321 (App., *infra*, 38a) (emphasis added).

Because the Board found "no evidence that an acquired psychiatric disease preceded [McKelvey's] alcoholism" (App., *infra*, 5a), it determined that Mr. McKelvey's alcoholism was "willful" and denied an extension. (App., *infra*, 5a.)

Mr. McKelvey then challenged the Board's decision in the United States District Court for the District of Columbia, invoking the court's jurisdiction pursuant to 28 U.S.C. § 1331 (1982). Mr. McKelvey raised both constitutional and statutory issues, including a claim that the willful misconduct regulation violated Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). District Judge Barrington Parker granted summary judgment for Mr. McKelvey on the Rehabilitation Act claim. *McKelvey* v. *Walters*, 596 F. Supp. 1317 (D.D.C. 1984) (App., *infra*, 32a-47a).

The Veterans' Administration sought review in the United States Court of Appeals for the District of Columbia Circuit, invoking that court's jurisdiction pursuant to 28 U.S.C. § 1291 (1982). On May 30, 1986, a divided panel of that court, consisting of Judges Ginsburg, Starr, and Scalia, reversed the decision of the District Court.[1] Judge Ginsburg dissented.

The majority reasoned that the willful misconduct regulation merely regulated the distribution of benefits on the basis of conduct. It held that the Veterans' Administration had reasonably concluded that alcoholism is a "willfully caused handicap" (App., *infra*, 11a), and stated that it was "initially the VA's responsibility, and not ours, to determine what is 'willful misconduct' ". (App., *infra*, 13a). The

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[1] The Court of Appeals remanded the case to the District Court for consideration of constitutional issues raised in the complaint. Mr. McKelvey will not pursue those issues, thus rendering the case appropriate for review by this Court.

majority concluded that the willful misconduct regulation "is a permissible means of discriminating among those suffering from alcoholism on the basis of their *conduct*." (App., *infra*, 13a). In so holding, the majority explicitly recognized (App., *infra*, 13a n.4) that its decision conflicted with *Tinch* v. *Walters*, 765 F.2d 599 (6th Cir. 1985), in which the Sixth Circuit, facing the identical issue, held that the willful misconduct regulation violates Section 504.

In her dissent, Judge Ginsburg examined the requirements for relief under Section 504, and concluded that Mr. McKelvey satisfied each of them.[2] She noted initially that alcoholics are "handicapped" under the Act, that the Veterans' educational assistance program is subject to Section 504, and that Mr. McKelvey is "otherwise qualified" to participate in the VA's educational benefit program (App., *infra*, 18a-19a). She then demonstrated that the majority erred in concluding that the willful misconduct regulation is based on conduct, noting that "under the majority's analysis, the government can never discriminate on the basis of alcoholism unless it explicitly admits that it is discriminating against alcoholics solely because they are handicapped. This mode of analysis effectively nullifies § 504 coverage of alcoholics." (App., *infra*, 21a).[3]

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[2] To establish discrimination under Section 504, a plaintiff must show (1) that he is a "handicapped individual" under the Act; (2) that he is "otherwise qualified" for the program of benefits from which he has been excluded; (3) that he has been excluded "solely" because of his handicap; and (4) that the program from which he has been excluded is subject to § 504. App., *infra*, 17a-18a; Doe v. New York University, 666 F.2d 761, 774-75 (2d Cir. 1981).

[3] All three judges below rejected the VA's arguments that legislative events after 1978, when Section 504 was amended to confirm that it applied to federal benefit programs, demonstrate that alcoholism may be treated as willful misconduct. App., *infra*, 9a-10a; 24a-26a.

REASONS FOR GRANTING THE WRIT

The decision below directly conflicts with the decision of the Sixth Circuit in *Tinch* v. *Walters*, 765 F.2d 599 (6th Cir. 1985), as well as district court decisions in two other circuits. Unlike the majority below, each of the other four Court of Appeals judges and three district judges who have considered the question have concluded that the willful misconduct regulation violates Section 504 of the Rehabilitation Act. Moreover, the decision below rests on an erroneous rationale which, if upheld, could emasculate the protections afforded alcoholics by Section 504 of the Act. Review by this Court is clearly warranted.

I. THE DECISION OF THE COURT BELOW DIRECTLY CONFLICTS WITH A RECENT DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND DECISIONS OF OTHER FEDERAL COURTS.

As the majority recognized, the decision below conflicts directly with the recent decision of the Sixth Circuit in *Tinch* v. *Walters*. Mr. Tinch was an alcoholic who, like Mr. McKelvey, was denied an extension of the time in which to use his educational benefits solely because of the willful misconduct regulation. The Sixth Circuit panel unanimously held that the willful misconduct regulation violates Section 504 of the Rehabilitation Act.

The majority below criticized *Tinch* v. *Walters* because it purportedly failed to recognize that discrimination against alcoholics under the willful misconduct regulation was based not on their handicap, but on the VA's "reasonable" determination that alcoholism is willful misconduct. The discrimination resulting from the willful misconduct regulation was based, in the majority's strained view, not on

Mr. McKelvey's handicap — alcoholism — but on his conduct — alcoholism. (App., *infra*, 10a, 14a).

In contrast, the Sixth Circuit correctly reasoned that a regulation which, by definition, excludes from the program a class of individuals recognized as handicapped under the Rehabilitation Act of 1973, solely because of their handicap, is impermissibly discriminatory. 765 F.2d at 603-604. The Sixth Circuit's conclusion relies on a common-sense understanding of the word "discrimination," rather than the illusory distinction of the majority below. The Sixth Circuit explicitly rejected the suggestion that the federal government may disregard Section 504 and discriminate against the handicapped. *Id.* at 604 n.5.

The Sixth Circuit's view is supported by district court decisions in at least two other circuits. In *Davis* v. *Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978), the court concluded that the exclusion of former drug abusers from consideration for city employment under programs receiving federal funds violates Section 504 of the Rehabilitation Act. *Id.* at 796-97. And in *Traynor* v. *Walters*, 606 F. Supp. 391 (S.D.N.Y. 1985), *rev'd on other grounds*, 791 F.2d 226 (2d Cir. 1986), District Judge Cooper, when presented with facts identical to those at issue here, concluded that the "willful misconduct" regulation violates Section 504.[4]

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[4] Judge Parker in this case, 596 F.Supp. 1317 (D.D.C. 1984), and Judge Taylor in Tinch V. Walters, 573 F.Supp. 346 (E.D. Tenn. 1983), reached the same conclusion as Judge Cooper.

A divided panel of the Second Circuit reversed *Traynor* because it concluded that 38 U.S.C. § 211(a) (1982) precluded judicial review. A petition for certiorari has been filed with this Court seeking review of the Second Circuit's decision in *Traynor*. No. 86-622 (Oct. 14, 1986). The court below concluded that it had jurisdiction to hear this case. App., *infra*, *6a-9a*.

The majority decision of the D.C. Circuit conflicts directly with decisions of courts in other circuits in identical or similar factual situations. Had Mr. McKelvey filed suit in the Sixth Circuit or other Circuits, he might now be using his educational benefits. The conflict among the federal courts is clear, and the writ should be granted to resolve it.

II. THE COURT BELOW INCORRECTLY DECIDED THE QUESTION PRESENTED.

The decision below rests on an improper analysis which negates the protections provided alcoholics under § 504 of the Rehabilitation Act of 1973. The majority concluded that the willful misconduct regulation simply categorizes a class of handicapped individuals on the basis of their conduct, and that discrimination on the basis of conduct is permissible. (App., *infra*, 14a.) As Judge Ginsburg noted, the majority's view would mean that discrimination on the basis of alcoholism could never be successfully challenged, because it could always be explained as regulation based on conduct. See page 6, *supra*.

The majority below also states that the Veterans' Administration may determine whether alcoholism is willful misconduct. (App., *infra*, at 13a.) This is simply incorrect. *Congress* has determined by statute that alcoholism is a handicap under the Rehabilitation Act, a determination that the VA may not challenge. [5] (App., *infra*, at 18a.) The

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[5] Such a challenge would be futile. All three judges below recognized that alcoholism is a handicap under § 504. App., *infra*, 14a, 18a. The Attorney General of the United States has reviewed the legislative history of § 504 and concluded that alcoholics are handicapped individuals. 43 Op. Att'y Gen. No. 12 at 2 (April 12, 1977). Subsequently, the predecessor of the Department of Health and Human Services issued guidelines reflecting this conclusion, 43 Fed. Reg. 2137 (1978), and the Veterans' Administration adopted those guidelines by regulation. 38 C.F.R. § 18.403(j)(2)(i)(C)

(footnote continues)

majority below thus completely undermines the protection afforded alcoholics *by statute* by permitting the VA *by regulation* to classify alcoholism as conduct. Section 504 prohibits limitation of eligibility for federal programs because of an individual's handicap, but through the willful misconduct regulation the VA has achieved just such a result. The regulation accordingly should be invalidated.

Questioning the implications of the result reached by the District Court, the majority below suggested that if the Rehabilitation Act precludes the VA from treating alcoholism as willful misconduct in the context of time limits, the same must be true in determining the availability of service-related disability compensation. 38 U.S.C. § 310 (1982). (App., *infra*, 12a n.3). The majority thus speculated that disability compensation payments would provide an incentive for unreformed alcoholics to continue to drink. None of the other seven federal judges who have considered the question was concerned about this "problem," nor should they have been. In the first place the issue that troubled the majority below is an issue of federal policy, one more properly addressed to Congress than to a federal Court of Appeals. [6] Moreover, as Judge Ginsburg noted in her dissent

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(footnote continued)

(1986). Several other courts have recognized that alcoholics are handicapped under § 504. *E.g.*, Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1231 n.8 (7th Cir. 1980); Whitaker v. Board of Higher Education, 461 F. Supp. 99, 106 n.7 (E.D.N.Y. 1978); Davis v. Bucher, 451 F. Supp. 791, 796-97 and n.4 (E.D. Pa. 1978).

[6] Congress has addressed such problems in the past. For example, in the context of job discrimination, Congress specifically removed alcoholics from the Rehabilitation Act's definition of "handicapped individual" if the alcoholism would prevent the individual from performing the job in question or would threaten the safety or property of others. 29 U.S.C. § 706(7)(B) (1982). Similarly, if the application of the willful misconduct regulation to the service-related disability program were truly a problem, Congress could easily act to correct it.

(App., *infra*, 26a-27a), the problem about which the majority is concerned is illusory and provides no justification for the VA's discriminatory regulation. [7]

III. THE DECISION OF THE COURT BELOW WILL ADVERSELY AFFECT THE RIGHTS OF ALCOHOLICS UNDER THE REHABILITATION ACT.

The decision below opens the way for federal and state agencies to deny alcoholics opportunities under federal or

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[7] The regulations implementing the Rehabilitation Act include the following provision:

> "[T]he exclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicapped persons is not prohibited by [the Act]." App., *infra*, 12a, 27a, quoting 28 C.F.R. § 41.51(c) (1986).

This regulation distinguishes the service-related disability compensation program from the educational benefits program. The former program is limited by federal statute to disabilities resulting from injuries or diseases suffered or aggravated in the line of duty during a period of war, 38 U.S.C. § 310 (1982), and thus would usually exclude alcoholics. In contrast, the automatic denial to alcoholics of extensions of time in which to use VA educational benefits results not from a statute establishing the program's scope, but only from regulations putting the VA's gloss on statutory language. The discrimination, in other words, is not part of the definition of the program, but relates only to the program's administration. App., *infra*., 27a-28a.

The majority also asserted that the willful misconduct regulation affects merely the "exclusion of . . . a specific class of handicapped persons from a program limited by federal statute . . . to a different class of handicapped persons" because it applies not to the Educational Benefits Program in its entirety, but only the Educational Benefits Program after ten years has elapsed. App., *infra*, 12a n.3. To hold that the Educational Benefits Program somehow becomes new and different after ten years defies common sense, and defines the word "program" so narrowly that it ultimately erodes the concept "discrimination." If the Veterans' Administration or other agencies could explain every act of discrimination against alcoholics in favor of other handicapped individuals as simply the exclusion of alcoholics from a narrowly defined program, discrimination against alcoholics could never be successfully challenged in any program for the handicapped. App., *infra*, 28a.

federally-supported programs that are afforded other individuals whose handicaps do not carry the stigma attached to alcoholism.[8] To cite only one example, in *Davis* v. *Bucher*, *supra*, the court invalidated under Section 504 regulations that enabled the city of Philadelphia to refuse to hire reformed alcoholics or drug abusers for city jobs, including jobs supported by the Comprehensive Employment and Training Act (CETA), 29 U.S.C. § 841 *et seq* (1982). But the decision below would permit a program sponsor to adopt regulations calling alcoholism "conduct," and thus discriminate against alcoholics on that basis.

The problem is not insignificant. There are millions of alcoholics in the United States today. A report by the National Research Council estimated that in the years 1971-1976 1.2% of the adult population, nearly three million people, consumed more than five ounces of alcohol, the equivalent of ten drinks, daily. National Research Council, Alcohol and Public Policy: Beyond the Shadow of Prohibition, p. 28, National Academy Press (1981). The protections afforded alcoholics by the Rehabilitation Act have a positive impact on the lives of many people, and should not be destroyed by the strained judicial construction of the majority below.

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[8] It is this concern that makes this case so vitally important. Because of changes in the VA's educational benefit program, cases identical to Mr. McKelvey's may not arise in the future. 38 U.S.C. § 1662. However, the risk presented by this case, that alcoholics may be excluded from federal programs merely by the use of carefully chosen regulatory language, is very real.

CONCLUSION

For the reasons discussed above, and particularly to correct the square conflict between the circuits, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Date: November 5, 1986

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5910

JAMES P. MCKELVEY

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, and VETERANS' ADMINISTRATION, APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 83-02063)

Argued November 26, 1985

Decided May 30, 1986

Robert V. Zener, Attorney, United States Department of Justice, with whom *Richard K. Willard*, former Acting Assistant Attorney General, *Joseph E. diGenova*, United States Attorney, and *Anthony J. Steinmeyer*, At-

torney, United States Department of Justice, were on the brief, for appellants.

Kenneth A. Teel, with whom *Douglas E. Winter*, *Arthur B. Spitzer* and *Elizabeth Symonds* were on the brief, for appellee.

Before: GINSBURG, SCALIA and STARR, *Circuit Judges*.

Opinion PER CURIAM.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* GINSBURG.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* SCALIA.

PER CURIAM: Federal law provides honorably discharged veterans with certain educational assistance benefits, *see* 38 U.S.C. § 1661(a) (1982), which must be used within ten years of discharge from the armed services, *see* 38 U.S.C. § 1662(a)(1). However, an extension of the limitation period is given to any veteran who is unable to use his educational benefits within ten years "because of a physical or mental disability which was not the result of such veteran's own willful misconduct." *Id.* Appellee James P. McKelvey successfully argued before the District Court that the Veterans' Administration violated § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982), in determining that his disability of alcoholism was attributable to his own "willful misconduct" and that he was therefore ineligible for an extension of the limitation period. *See McKelvey v. Walters*, 596 F. Supp. 1317, 1323-24 (D.D.C. 1984). Two issues are presented by the VA's appeal: Does 38 U.S.C. § 211(a) (1982) deprive us of jurisdiction to review the VA's decision? If not, has the VA violated the Rehabilitation Act in determining that all alcoholism (except that which is the result of an acquired psychiatric disorder) is caused by "willful misconduct" within the meaning of the exception to the limitation extension?

I

A

The G.I. Bill has for many years granted to each honorably discharged veteran certain educational assistance benefits which must be used in the ten years following the veteran's last discharge or release from active duty. *See* 38 U.S.C. §§ 1661(a), 1662(a)(1). In 1977, Congress amended the statute to extend the limitation period for those veterans who were unable to use their educational benefits during that period "because of a physical or mental disability which was not the result of [their] own willful misconduct." Pub. L. No. 95-202, tit. II, § 203(a)(1), 91 Stat. 1433, 1439 (1977) (codified at 38 U.S.C. § 1662(a)(1) (1982)). The "willful misconduct" qualification was not a new concept; the same limitation was already contained in a number of previously enacted veterans benefit provisions. *See* 38 U.S.C. § 105 (definition of injury or disease occurring "in line of duty"); 38 U.S.C. § 310 (disability compensation for injuries suffered or diseases contracted "in line of duty"); 38 U.S.C. § 410 (dependency and indemnity compensation); 38 U.S.C. § 521 (non-service connected disability payments).

The VA regulations and interpretations which the VA applied in the present case are the same as those in effect when the 1977 provision was enacted. The regulations define "willful misconduct" in general as "an act involving conscious wrongdoing or known prohibited action . . . . It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 38 C.F.R. § 3.1(n)(1) (1985). With respect to alcoholism in particular the regulations provide:

> (2) *Alcoholism.* The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance

> or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately [*sic*] and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

38 C.F.R. § 3.301(c)(2) (1985). The VA's longstanding interpretation of these provisions is that the disease of alcoholism is a result of willful misconduct unless it is "secondary to and a manifestation of an acquired psychiatric disorder." Administrator's Decision, Veterans' Administration No. 988, *Interpretation of the Term "Willful Misconduct" as Related to the Residuals of Chronic Alcoholism* at 1 (Aug. 13, 1964). The type of alcoholism regarded by the VA as not the result of willful misconduct is referred to as "secondary," while willful alcoholism is labeled "primary." *See id.* The VA treats drug addiction substantially the same as alcoholism. *See* 38 C.F.R. § 3.301(c)(3).

B

McKelvey served on active duty with the United States Army from September 1963 to September 1966. In the nine-year period following his discharge, McKelvey was hospitalized repeatedly for alcoholism and associated problems. He has not had a drink since May 10, 1975.

In November of 1977, more than ten years after his discharge, McKelvey applied for educational assistance benefits, asserting that his alcoholism had prevented him from using the benefits earlier. The VA denied the application. On review before the Board of Veterans Appeals, McKelvey attempted to prove that his alcoholism

was "secondary," but the Board found "no evidence that an acquired psychiatric disease preceded [McKelvey's] alcoholism." *In the Appeal of James P. McKelvey*, No. 79-04 991, Findings and Decision at 6 (Aug. 6, 1980) ("1980 Decision"). As the VA regulations required it to do in the absence of such evidence, the Board sustained the determination that McKelvey's alcoholism was "willful" and that McKelvey was therefore not entitled to an extension.

McKelvey filed suit in the District Court for the District of Columbia, asserting that the willful misconduct regulation (38 C.F.R. § 3.301(c)(2)) was arbitrary and outside of the VA's statutory authority; that the VA's treatment of alcoholism was illegal under § 504 of the Rehabilitation Act; and that he had been denied his rights under the due process and equal protection clauses of the fifth amendment. The District Court, after concluding that 38 U.S.C. § 211(a) did not bar review of the VA's action, *see McKelvey*, 596 F. Supp. at 1320-21, held that § 3.301(c)(2) represented an entirely reasonable construction of the "willful misconduct" provision of 38 U.S.C. § 1662(a)(1), *see id.* at 1321-23, but that it violated § 504 of the Rehabilitation Act by discriminating on the basis of the handicap of primary alcoholism. The regulation would be lawful, it said, if the government could show a "substantial justification" for the discrimination. *Id.* at 1324. The court found the government's asserted justification that primary alcoholism "is a voluntary handicap" to be "superficially plausible," but rejected it on the belief that under § 3.301(c)(2) primary alcoholism is deemed *in*voluntary (*i.e.*, is classified as secondary alcoholism) once it results in further disability. *Id.* The Court invalidated 38 C.F.R. § 3.301(c)(2) and ordered the VA to determine anew whether McKelvey suffered a disability attributable to his own willful misconduct within the meaning of 38 U.S.C. § 1662(a)(1). *Id.* at 1325. The VA appeals.

II

38 U.S.C. 211(a), in pertinent part, provides:

> [T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

This court has not yet reached a definitive decision on the breadth of this no-review provision.[1] Because of the unusual, perhaps *sui generis*, posture of this case, we need not and do not essay such a decision today. Rather, we hold that § 211(a) does not preclude review in the unusual situation present here: the VA itself had never decided the question McKelvey's Rehabilitation Act plea raises until that question was posed for adjudication before this court.

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[1] In *Carter v. Cleland*, 643 F.2d 1 (D.C. Cir. 1980), this circuit held unreviewable sufficiency of evidence questions, *id.* at 7, and interpretive guidelines, *id.* at 8, but reserved judgment on when courts could review regulations or decisions made under a statute other than the veterans benefits laws. In *Kirkhuff v. Nimmo*, 683 F.2d 544, 547-48 (D.C. Cir. 1982), the court surveyed recent judicial interpretations of § 211(a) but declined to resolve "this difficult question"; instead, the court ruled against the claimant on the merits. In *Gott v. Walters*, 756 F.2d 902, 907 (D.C. Cir. 1985), over a strong dissent, a panel of this court held that every decision made by the Administrator "in the course of a determination under the veterans benefit laws" was unreviewable under § 211(a). The circuit vacated that decision upon voting to rehear the appeal en banc, but the case was dismissed as moot in advance of the scheduled full court review.

A divided panel of the Second Circuit, in a case involving the same Rehabilitation Act plea as the one presented here, held § 211(a) a bar to judicial review. Traynor v. Walters, No. 85-6208 (2d Cir. May 16, 1986). *Traynor* cites as in accord our panel decision in *Gott* without noting the vacation of that decision.

Section 211(a)'s preclusion of review depends, at a minimum, on the satisfaction of this condition: the petitioner's claim must have been resolved by an actual "decision of the Administrator." *See Johnson v. Robison*, 415 U.S. 361, 367 (1974). At the time of the initiation of this suit, the Administrator had made no decision concerning the impact of the Rehabilitation Act on McKelvey's time extension application. Therefore, in its initial brief on appeal to this court, the VA maintained that § 211 did not block review. Specifically, the VA told us:

> McKelvey did not make a Rehabilitation Act claim before the Board of Veterans Appeals; and it is not clear that the Board would have had authority to consider such a claim had he made it. We do not read 38 U.S.C. § 211(a) to preclude judicial review of a point that the Veterans Administration never considered and, under existing regulations, probably had no authority to consider.

Brief for Appellants at 9-10 n.1.

At oral argument this court, on its own motion, invited .the parties to submit supplemental briefs on three questions: whether the VA had authority to consider the Rehabilitation Act claim; if it did, what was the impact of that Act on McKelvey's time extension application; and whether § 211(a) precluded this court from undertaking judicial review in this case. Responding to our request, the VA asserted that it does have the authority to consider the effect of the Rehabilitation Act on McKelvey's time extension application. The VA's supplemental brief featured a letter composed in light of the court's inquiries by the General Counsel of the VA. The General Counsel's letter announced for the first time the VA's official position: the Rehabilitation Act does not invalidate the view that "primary" alcoholism is in all cases "willful misconduct." This letter, the VA ultimately argues, fundamentally changes the situation in the present case. The VA has now spoken, it has made a decision on the point of law on which McKelvey's case

turns. Because the element earlier missing has lately been supplied, the VA concludes, § 211(a) now leaps into play to bar review of the VA decision just made. *See* Supplemental Brief for Appellants at 5.

This "switched off, then on" interpretation of § 211(a) would place the VA in a remarkable position. The interpretation would allow the VA to try out judicial review risk free. The agency could allow a challenge to its action to proceed in the district court secure in the knowledge that if the VA lost there, it could retroactively shield the action from judicial review.

Under the VA's interpretation, § 211(a) did not bar review on July 19, 1983, when McKelvey filed his Rehabilitation Act-grounded claim with the district court, because the VA had made no decision concerning that Act at that time; nor did the statute bar review on October 19, 1984, when the district court issued its judgment against the VA; nor on December 30, 1984, when the VA chose to appeal that judgment; nor even on November 26, 1985, when, after full briefing by both parties, this court heard oral argument on the VA's appeal. But throughout this two and one-half year judicial proceeding, the VA now argues, it has held a trump card up its sleeve: even after the parties and two courts have expended the resources necessary for full and fair litigation, the VA, simply by releasing an official pronouncement on the matter *sub judice*, can preempt the judicial process, and convert the District Court's judgment into a declaration that merely advises, but does not control the agency.

We are confident that Congress never envisioned such a gambit when it provided that veterans benefits claims should start and finish at the administrative level without coming to court at all. Section 211(a)'s application is to be determined firmly and finally as of the date that plaintiff commences litigation, so that a district court may issue a judgment that will not later be set aside by an

executive agency's fiat. By the VA's own admission, because it had left a potentially dispositive question undecided, § 211(a) did not bar court adjudication when McKelvey lodged his claim in this case. We therefore have jurisdiction to hear this appeal.

We emphasize, however, the narrowness of our holding. We do not, for example, pass on whether § 211(a) precludes review of veterans' benefit regulations to determine whether they exceed the VA's statutory authority. *Cf. Wayne State University v. Cleland*, 590 F.2d 627, 632 (6th Cir. 1978) (no preclusion); *University of Maryland v. Cleland*, 621 F.2d 98 (4th Cir. 1980) (same); *Evergreen State College v. Cleland*, 621 F.2d 1002 (9th Cir. 1980) (same); *Merged Area X (Education) v. Cleland*, 604 F.2d 1075 (8th Cir. 1979) (same). Indeed, we do not anticipate another occasion to review a VA order on the basis that supports our review today. The VA has now determined it does have authority to decide on the effect and applicability of federal statutes other than veterans' legislation when the agency acts on benefits claims. We therefore expect that the VA will not again regard as outside the arsenal of law it applies any potentially relevant congressional enactment.

III

We can dispose of one of the government's points on appeal summarily. It was not until 1978—one year after Congress enacted the extension of the ten-year limitation period that is the subject of this suit—that the Rehabilitation Act was amended to make § 504 applicable to federal agencies in the administration of programs of financial assistance. *See* Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2955, 2982. Since that 1978 amendment, the Senate has on four occasions passed bills to provide that alcoholism shall not be considered "willful misconduct" for the purposes of 38 U.S.C. § 1662(a)(1). None of the bills passed the House.

See S. REP. No. 604, 98th Cong., 2d Sess. 39 (1984). The VA argues that this "subsequent legislative history" proves that § 504 does not prevent it from treating most alcoholism as willful misconduct. As the Supreme Court and this court have repeatedly remarked, the views of later Congresses as to the meaning of enactments by their predecessors are of very little, if any, significance. *See United States v. Clark*, 445 U.S. 23, 33 n.9 (1980); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Rainwater v. United States*, 356 U.S. 590, 593-94 (1958); *AFGE, Locals 225, et al. v. FLRA*, 712 F.2d 640, 647 & n.29 (D.C. Cir. 1983).

We have considerable difficulty, however, understanding why § 504 is by its terms applicable here. It provides as follows:

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .

29 U.S.C. § 794. According to McKelvey, and the District Court, the VA has discriminated against McKelvey "solely by reason of his handicap" within the meaning of this provision. McKelvey concedes that a regulation would not violate § 504 if it granted a particular benefit (such as an extension from an otherwise applicable limitation period) to all ~~or~~ a particular class of handicapped individuals, but excluded those whose handicap resulted from their own willful misconduct. The "discrimination" under such a scheme would be on the basis of *conduct*, not on the basis of handicap. Presumably, then, McKelvey would not object to a VA regulation that stated nothing more than, "Those alcoholics whose alcoholism is attributable to their own willful misconduct are ineligible for educational benefits extensions." Such a regulation would

do no more than restate, in the context of the particular handicap of alcoholism, the concededly valid distinction made in 38 U.S.C. § 1662(a)(1).

The essence of McKelvey's § 504 claim, therefore, is disagreement with the VA's conclusion that primary alcoholics—*i.e.*, those alcoholics whose condition is not the result of an acquired psychiatric disease—suffer from a willfully caused handicap. It seems to us, however, that the agency's conclusion is a reasonable one, which is all that is needed to sustain it.[2] "At the time of the enactment of 38 U.S.C. § 1662 in 1977, there was, and even presently there is, much controversy as to the nature and cause of alcoholism." *Burns v. Nimmo*, 545 F. Supp. 544, 546 (N.D. Iowa 1982). McKelvey asserts that "[t]he medical world has recognized that alcohol abuse is generally outside of the individual's control," Brief for Appellee at 5 n.1; but the VA points to a substantial body of medical literature that even contests the proposition that alcoholism is a disease, much less that it is a disease for which the victim bears no responsibility, *see* Brief for Appellants at 18-19 n.4. Even on the basis of medical opinion alone, it seems to us the agency's position has the necessary minimum support. But it is in any case seriously doubtful whether the statutory test of "willful misconduct"—any more than the test for insanity in criminal prosecutions, *see United States v. Brawner*, 471 F.2d 969, 981-83 (D.C. Cir. 1972) (en banc)—calls for invocation of a medical judgment as opposed to applica-

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[2] We note in passing that McKelvey's claims assert discrimination between various categories of handicapped individuals (those who are granted the limitation extension and primary alcoholics, who are not) rather than between handicapped individuals and others. At least one other court of appeals has expressed "serious doubts whether Congress intended § 504 to provide plaintiffs with a claim for discrimination vis-a-vis other handicapped individuals." *Colin K. v. Schmidt*, 715 F.2d 1, 9 (1st Cir. 1983). The manner of our disposition renders it unnecessary to address that point.

tion of general societal perceptions regarding personal responsibility. On the basis of the latter criterion, we would find it impossible to deem unreasonable the VA's assessment that only a psychiatric disorder can prevent alcoholism from being the consequence of "willful misconduct." It is suggestive of general societal perceptions that the Veterans' Affairs Committee of the Senate (to take a particularly pertinent example of societal attitudes) expressed the belief that alcoholism and drug addiction "are to some extent within [the veteran's] control," S. REP. No. 314, 96th Cong., 1st Sess. 26 (1979). It is immaterial whether or not such attitudes are correct; the point is that it was within the bounds of reasonable interpretation of the statute for the agency to reflect them. The consequence of McKelvey's interpretation, it should be noted, is not merely to make the limitation extension available to a person who has brought his alcoholism under control; but to make monetary benefits payable to alcoholics who show no sign of, and have no intention of, improving their condition.[3] In sum: It is

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[3] As noted earlier, *supra* page 3, veterans benefit statutes authorizing death and disability compensation, disability pensions, and dependency and indemnity benefits preclude payment of such benefits when it is determined that the death or disabling injury or disease resulted from the veteran's own "willful misconduct." There is no basis for giving the term a different meaning in the limitation extension than in the other portions of the same statutory scheme. Even if legislative history might be thought capable of justifying such a strange result, the legislative history of the 1977 limitation extension makes it clear that in determining "willful misconduct" "the same standards [are to] be applied as are utilized in determining eligibility for other VA programs under title 38." S. REP. No. 468, 95th Cong., 1st Sess. 69-70 (1977).

The original regulations issued by HEW in implementing the Rehabilitation Act, *see infra* note 5, included the following provision, 45 C.F.R. § 85.51(c) (1978) (codified as redesignated at 28 C.F.R. § 41.51(c) (1985)): "The exclusion of . . . a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicapped persons is not prohibited by [the Act]." The

initially the VA's responsibility, and not ours, to determine what is "willful misconduct." We cannot say that the resolution here is unsupported by substantial evidence or otherwise arbitrary. We conclude, therefore, that since the agency's application of 38 C.F.R. § 3.301(c)(2) is a permissible means of discriminating among those suffering from alcoholism on the basis of their *conduct*, McKelvey's § 504 claim is without merit.

The contrary conclusion of the District Court is based on several erroneous premises.[4] The court held that "the willful misconduct regulation discriminates against McKelvey on the basis of his handicap: primary alcoholism." *McKelvey*, 596 F. Supp. at 1323. But in the VA's terminological scheme, "primary" is merely another way of saying "willful." "Primary alcoholism" is not a distinct

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dissent argues that since the veterans disability compensation programs are limited by federal statute to veterans with disabilities not attributable to "willful misconduct," while the educational benefits program is available to *all* honorably discharged veterans, pursuant to this regulation the Rehabilitation Act requires alteration of the VA's definition of alcoholism and drug abuse for the latter purpose but not for the former. Even if the distinction drawn by the HEW regulation is sound, however, it has no proper application to the present case. McKelvey is objecting to discriminatory application, not of the general, ten-year educational benefits program, but of the limitation period extension, which *is* "limited by federal statute . . . to a [specific] class of handicapped persons" in precisely the same fashion as the disability compensation programs.

[4] Only one federal court of appeals has considered the lawfulness of 38 C.F.R. § 3.301(c)(2) in light of § 504 of the Rehabilitation Act. In *Tinch v. Walters*, 765 F.2d 599 (6th Cir. 1985), the court devoted only three paragraphs to the issue (excluding its discussion of legislative history), and, in reasoning that tracked that of the District Court in this case almost sentence-by-sentence, held the regulation unlawful. *See id.* at 603-04. In discussing our disagreement with the District Court, we will at the same time be indicating why we cannot agree with the decision of the Sixth Circuit.

handicap; "primary" and "secondary" are labels the VA uses to express its *conclusion* about which of those suffering from the single handicap of alcoholism [5] do so because of their own willful misconduct. Under the District Court's reasoning, the VA could not lawfully deny extensions to veterans paralyzed because of their reckless driving because to do so would be to discriminate on the basis of the "handicap" of "willful paralysis." It is certainly true that primary (or willful) alcoholics are discriminated against, but that discrimination is based upon conduct, not upon a distinct "handicap" called "primary alcoholism."

The District Court further objected that "[t]he Board's interpretation of the regulation precluded it from considering relevant evidence which was causally related to [McKelvey's] handicap". *McKelvey*, 596 F. Supp. at 1323. In the District Court's view, such "relevant evidence" included the age at which McKelvey started drinking and evidence that his father and brother were alcoholics. But, as we have held above, the VA has reasonably determined that such evidence is *not* "relevant" to the issue of whether a particular veteran's alcoholism is attributable to willful misconduct. The questions so effortlessly decided by the District Court are the subject of

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[5] Shortly after enactment of § 504, the Secretary of the Department of Health, Education and Welfare—the agency charged by the President with responsibility for determining who are "handicapped individuals" within the meaning of 29 U.S.C. § 706(6) (1976) (codified as amended at 29 U.S.C. § 706(7)(B) (1982))—asked the Attorney General for his opinion on whether *alcoholics* are handicapped for purposes of the Rehabilitation Act. The Attorney General responded affirmatively. *See* 43 Op. Att'y Gen. No. 12 (Apr. 12, 1977). HEW then issued guidelines reflecting that conclusion, *see* 43 Fed. Reg. 2132, 2137 (1978), and the VA adopted those guidelines by regulation, 45 Fed. Reg. 63,264, 63,269 (1980) (codified at 38 C.F.R. § 18.403(j)(2)(i)(C) (1985)). In all cases, reference was made to the singular handicap of "alcoholism"; at no time was it suggested that distinct handicaps of "primary" and "secondary" alcoholism exist.

controversy within the field of medicine and within what might be termed the arena of popular moral philosophy. The VA, in a reasonable exercise of its discretion, embraced the views of one side in those controversies. The District Court acted improperly in substituting its own judgment.

Finally, the District Court found that *all* alcoholics were discriminated against because those suffering from other handicaps "unlike alcoholics, are not required to prove the existence of a secondary disease in order to escape a finding of willful misconduct with respect to their primary condition." *McKelvey*, 596 F. Supp. at 1324. That conclusion was based upon the District Court's belief that, once primary alcoholism results in a secondary disability (*e.g.*, cirrhosis), not only does the VA not consider the secondary disability to have been caused by "willful misconduct," but it also reclassifies the primary alcoholism as secondary—*i.e.*, not caused by willful misconduct. The latter part of this belief is simply wrong. Disabilities that result from primary alcoholism are not deemed a product of "willful misconduct," but the alcoholism which caused them *is*. This is clear not only from the text of § 3.301(c)(2) but from the opinions of the Board of Veterans Appeals. *See* 1980 Decision at 6; *In the Appeal of James P. McKelvey*, No. 79-04 991, Findings and Decision (Reconsideration) at 4 (Feb. 23, 1982). Thus, alcoholics, just like every other handicapped veteran, are merely required to prove that their disability is not attributable to willful misconduct.

It might be argued, however, that even if McKelvey has not been discriminated against in the application of substantive criteria, he has suffered "procedural" discrimination. Unlike those suffering from every other handicap (except drug addiction), alcoholics do not receive completely "individualized" consideration of whether their handicap resulted from willful misconduct. Instead, the VA has established an irrebutable presumption that all persons suffering from this particular handicap do so

as a result of their own misconduct, unless they ca
prove an underlying psychiatric disability. We think suc
a claim of "procedural" discrimination must fail. Dis
parate treatment does not necessarily constitute th
invidious "discrimination" outlawed by the Rehabilitatio
Act; disparate treatment that has a substantial justifica
tion is lawful. *See New York State Ass'n for Retarde
Children, Inc. v. Carey*, 612 F.2d 644, 649-50 (2d Cir
1979); *Pinkerton v. Moye*, 509 F. Supp. 107, 114 (W.D
Va. 1981). Were the VA to promulgate a regulatio
requiring those claiming paralysis to submit to medica
examination, but not requiring such examination fo
those claiming disability on the basis of loss of limbs
it would be absurd to think that the Rehabilitation Ac
was violated. It is no discrimination, in other words
to establish for various disabilities the sorts of pro
cedures that are distinctively appropriate. Alcoholism
unlike any other disability except drug addiction (which
has been subjected to the same procedural presumption),
is self-inflicted—whether or not the self-infliction can
be considered "willful." It is therefore feasible for alco
holism, as it is not for all other disabilities except drug
addiction, to make a generalized determination that will
fulness exists unless there is established the singular
exculpation for self-infliction (psychiatric disorder) that
the agency has chosen to acknowledge. Since we have
approved the substance of that determination, it would
insult common sense to require the agency to make it
repetitiously, by consistently denying non-psychiatric de
fenses in individual adjudications instead of precluding
them generically, as it has, by rulemaking. *Cf. NLRB v.
Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974); *SEC v.
Chenery Corp.*, 332 U.S. 194, 202-03 (1947).

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The decision of the District Court is reversed and the
case is remanded for consideration of McKelvey's consti
tutional claims.

So ordered.

GINSBURG, *Circuit Judge, concurring in part and dissenting in part*: I agree, for the reasons stated in Section II of the per curiam opinion, that we have jurisdiction over this appeal; on the merits, I dissent from the majority's position that the Rehabilitation Act does not invalidate the challenged application of the "willful misconduct" regulation. Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, prohibits governmental discrimination on the basis of handicap; authoritative regulations establish that alcoholism is a handicap; and solely because McKelvey is an alcoholic, the Veterans' Administration (VA) refused to consider relevant evidence that McKelvey's delay in collecting benefits was not attributable to "willful misconduct." Yet the majority concludes that the VA's denial of McKelvey's request for an extension does not violate Section 504 because the VA may simply reclassify alcoholism as "conduct" rather than a "handicap" and thus discriminate on the basis of conduct, not handicap. This view of Section 504 would evade that provision's proscription, and the majority's alignment with the VA's reasoning puts this circuit squarely in conflict with a sister circuit. *Tinch v. Walters*, 765 F.2d 599 (6th Cir. 1985), *affirming* 573 F. Supp. 346 (E.D. Tenn. 1983).[1]

A. *The Rehabilitation Act*: Section 504 of the Rehabilitation Act provides in pertinent part: "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, . . . be subjected to discrimination . . . under any program or activity conducted by any Executive agency." To establish discrimination under this provision, a plaintiff must demonstrate four elements: (1) he is a "handicapped individual" under the Act; (2) he is "otherwise qualified" for the program of benefits from which he has been excluded; (3) he has been excluded "solely" because of his handicap; and (4) the program from which he has been excluded is subject to

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[1] The only other federal court that has thus far addressed the issue agreed with the adjudication in our district court

Section 504. *See, e.g., Doe v. New York University*, 666 F.2d 761, 774-75 (2d Cir. 1981).

McKelvey has unproblematically established the elements designated (1) and (4) in the above enumeration. As to element (4), the VA regulations themselves list the educational benefits program as one subject to Section 504, *see* 38 C.F.R. § 18, Appendix A to Subpart D, and defendants do not dispute this point. Regarding element (1), the VA, the Department of Justice, the Department of Health and Human Services (HHS), and apparently the majority are in agreement that McKelvey is a handicapped individual under the Act. After Congress enacted Section 504, the President directed the predecessor of HHS, the Department of Health, Education, and Welfare (HEW), to promulgate regulations that would establish "standards for determining who are handicapped individuals." He further instructed each subject federal agency to issue "regulations . . . consistent with the standards established" by HEW. Executive Order 11914 (April 28, 1976). In carrying out this directive, HEW asked the Attorney General of the United States for an opinion whether alcoholics are "handicapped individuals." After carefully reviewing the legislative history, the Attorney General answered that question in the affirmative. *See* 43 Op. Att'y Gen. No. 12 at 2 (April 12, 1977). HEW then issued guidelines reflecting this conclusion, *see* 43 Fed. Reg. 2137 (1978), and the VA, in turn, adopted those guidelines by regulation. *See* 38 C.F.R. § 18.403 (j) (2) (i) (c). In sum, no serious contention exists that alcoholics are not handicapped individuals within the meaning of the Act.

The dispute in this case involves the other two elements of Section 504. Concerning element (2), the VA

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and in the Sixth Circuit, *see* Traynor v. Walters, 606 F. Supp. 391 (S.D.N.Y. 1985), but the district court decision in *Traynor* was reversed when a divided Second Circuit panel found judicial review precluded. Traynor v. Walters, No. 85-6208 (2d Cir. May 16, 1986).

argues that McKelvey is not "otherwise qualified" for the benefit program in question for, even if it is conceded that his alcoholism rendered him handicapped, he has nonetheless failed to meet the ten-year deadline for use of educational benefits. *See* Brief for Appellants at 17. This is bootstrap argument. McKelvey's challenge targets precisely the discriminatory operation of the deadline itself. The VA cannot tenably argue that the deadline scheme escapes inspection for discrimination because McKelvey is not "otherwise qualified" by virtue of the very same deadline implementation he has placed at issue.

In *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979), the Supreme Court explained what the statutory phrase "otherwise qualified" means. Quoting from an HEW regulation implementing Section 504, 45 C.F.R. § 84.3(k)(3) (1978)—a regulation that the VA has adopted as its own, *see* 38 C.F.R. § 18.403(k)(3)—the Court observed: "With respect to postsecondary and vocational education services, [an otherwise qualified individual is one] who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity." *Id.* The Court went on to quote HEW's explanatory note to the regulation, 45 C.F.R. pt. 84, App. A, at 405: "The term 'technical standards' refers to all nonacademic admissions criteria that are essential to participation in the program in question." 442 U.S. at 406.

Plaintiff McKelvey satisfies these requirements. The government does not suggest that McKelvey in any way fails to meet an "academic [or] technical standard requisite to admission or participation." The ten-year deadline plainly is not an academic standard, nor, according to the above-stated HEW definition, is it a technical one; indeed, it is not an admissions criterion at all, and it surely is not essential to McKelvey's successful participation in the program.

Turning finally to the element earlier set out as (3), *see supra* at 1, I inquire whether the VA's "willful misconduct" regulation discriminates against McKelvey "solely"on the basis of his handicap. As the district court explained in its thoughtful opinion, the VA's regulation automatically brands primary alcoholics as persons guilty of willful misconduct: the VA will not even consider evidence that might prove the branding false, for example, showings that McKelvey began drinking at the age of thirteen and that within his family, the incidence of alcoholism was high. Former alcoholics, in short, cannot gain deadline extensions by presenting facts indicating that they were not guilty of "willful misconduct." To gain time to use their accrued benefits, they must demonstrate that they were not primary alcoholics. By contrast, all other individuals need show only that they did not engage in "deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 38 C.F.R. § 3.1(n)(1). *See McKelvey*, 596 F.Supp. at 1323.[2]

The majority maintains, however, that this discrimination occurs on the basis of conduct, not handicap, and that therefore the VA's view on what constitutes "willful misconduct" need only be reasonable. *See* maj. op. at 10-11. Since the VA's view is reasonable, *see id.* at 11-13, "it would insult common sense to require the agency to make it repetitiously, by consistently denying non-psychiatric defenses in individual adjudications instead of precluding them generically, as it has, by rulemaking." *Id.* at 16.

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[2] The VA argues that its regulation does not presume willful misconduct but merely "focuses" the factfinder's attention on "whether an underlying psychiatric disorder caused excessive drinking." Brief for Appellants at 20. This "focus," however, conclusively denies that alcoholic veterans who do not suffer from an acquired, classifiable psychiatric disorder may be innocent of willful misconduct.

The majority nods in its conclusion that the discrimination contained in the "willful misconduct" regulation is based on conduct. As set out earlier, *supra* at 2, authoritative HEW guidelines, adopted by the VA itself, establish that alcoholism is a handicap. The VA's discrimination in this case was based on McKelvey's alcoholism. The VA's decision therefore discriminated on the basis of handicap. The majority's position would allow the VA to escape this syllogism by the simple expedient of redenominating alcoholism as conduct. Discrimination on the basis of alcoholism will therefore never be discrimination "solely" on the basis of handicap, because alcoholism is both conduct and a handicap. As a result, under the majority's analysis, the government can never discriminate on the basis of alcoholism unless it explicitly admits that it is discriminating against alcoholics solely because they are handicapped. This mode of analysis effectively nullifies Section 504 coverage of alcoholics.

Similarly, the government argues that the VA's discrimination rests not "solely" on McKelvey's handicap but also on the passage of the ten-year delimiting period. *See* Brief for Appellants at 17. This twice-made argument gains no force through repetition. It fails here for the re on that the same argument failed to prove McKelvey was not "otherwise qualified": passage of the ten-year period forecloses McKelvey's use of educational benefits *only* because the VA has created a time limit that discriminates against primary alcoholics. An agency may not promulgate a regulation that discriminates solely on the basis of handicap and then sensibly argue that because the regulation is an additional basis for the discrimination, the agency does not discriminate solely on the basis of handicap.[3]

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[3] The government's appeal to Alexander v. Choate, 53 U.S.L.W. 4072 (Jan. 9, 1985), is unavailing. That decision did not broadly hold, as the government claims, that "the Rehabilitation Act does not invalidate statutory time limita-

B. *38 U.S.C. § 1662(a)(1)*: The VA's next argument does not stem from the Rehabilitation Act but from the statute governing veterans benefits time limit extensions: the VA argues that the statutory time prescription, 38 U.S.C. § 1662(a)(1), incorporated the VA's definition of "willful misconduct." To uphold McKelvey's Rehabilitation Act claim, the government therefore contends, we would have to find that Congress' extension of that Act to the federal government in 1978, *see* 29 U.S.C. § 794(a)(2), implicitly repealed section 1662(a)(1), which was passed in 1977. Implicit repeals, however, are disfavored and should be found only when two statutes are irreconcilable. *See Morton v. Mancari*, 417 U.S. 535, 549-50 (1974). The VA thus urges us to accept its interpretation of the Rehabilitation Act so as to reconcile the two statutes.

As already explained, *supra* at 2-5, the VA's interpretation of the Rehabilitation Act is not persuasive. Nor need one indulge the VA's interpretation in order to "harmonize" the two acts, for there is no necessary conflict between the statutes. Unavoidable conflict arises only if one accepts the VA's contention that section 1662(a)(1) incorporated into the statute itself the VA's definition of "willful misconduct" as applied in the context of alcoholism. For McKelvey's claim to succeed, therefore, we need only invalidate pro tanto the VA regulation, 38 C.F.R. § 3.301(c)(2), equating alcoholism with "willful misconduct," as the VA applies that regulation in administering section 1662(a)(1). It would

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tions." Brief for Appellants at 18. Rather, the Court held only that the neutral time limit on hospitalization benefits at issue in that case did not create the kind of disparate impact between handicapped individuals and others that would constitute discrimination under the Act. But the opinion clearly indicated that a time limit, such as the one before us, that is *not* neutral on its face as between handicapped individuals and others *would* constitute intentional discrimination. *See* 53 U.S.L.W. at 4075-77.

thus be possible to invalidate the regulation but leave section 1662(a)(1) intact.

For the argument that section 1662(a)(1) incorporates or codifies the VA's definition of "willful misconduct" in its entirety, the VA relies on a passage from the Senate Report accompanying the section. By regulation, the VA had for many years provided for extension of the time limit on benefit utilization in cases of disability not occasioned by "willful misconduct," and since 1964, the VA had characterized primary alcoholism as "willful misconduct." *See* maj. op. at 3-4. Congress passed section 1662(a)(1) in 1977 to provide by statute for time limit extensions in cases of disability not a result of "willful misconduct." The accompanying Senate Report noted: "In determining whether the disability sustained was the result of the veteran's own 'willful misconduct,' the Committee intends that the same standards be applied as are utilized in determining eligibility for other VA programs under title 38. In this connection, see 38 C.F.R., part III, paragraphs 3.1(n) and 3.301 [the "willful misconduct" regulation], and VA Manual M21-1, section 1404." S. REP. No. 468, 95th Cong., 1st Sess. 69-70 (1977).

I do not read this passage, as the VA does, to codify the particular regulations cited in the Senate Report. If Congress had intended to import those specific provisions into the statute, one might have expected Congress simply to transfer to the legislation the very words appearing in the regulations. Instead of reading the Senate Report passage to indicate that Congress meant to freeze by statutory incorporation particular regulatory provisions, I think another interpretation more sensible: Congress, in 1977, envisioned only that the VA would use the "same standards"—whatever those standards might be as contained in the effective regulations at any given time—in granting extensions as in "determining eligibility for other VA programs." The passage's reference to par-

ticular regulations "[i]n this connection," I therefore conclude, was intended not to indicate that Congress was codifying those regulations but only to point out as illustrative the standards used at that time in eligibility determinations. Thus, I believe we may and should grant McKelvey's Rehabilitation Act claim and invalidate the VA's "willful misconduct" regulation pro tanto—as it applies to exclude former alcoholics from educational benefit time limit extensions—without implicitly repealing section 1662(a)(1).[4]

Congress apparently did alter its perspective in 1978 on whether the "same standards" should be used in granting extensions as in "determining eligibility for other VA programs." The 1977 Committee Report, as quoted above, seems to be simply adverting to the general principle that like phrases should be read alike in the same statute absent contrary indications. As I will explain, *see infra* at 10-12, the specific operation of the Rehabilitation Act is such a contrary indication: Section 504 prohibits the VA from applying its definition of willful misconduct to educational benefit time limit extensions but not in other contexts, such as determining eligibility for disability compensation.

In a further attack on the conclusion that the Rehabilitation Act requires a modified reading of the "willful misconduct" regulation, the VA cites legislative "history" that postdates the Act. After the 1978 extension of the Rehabilitation Act to the federal government, the Senate in 1979, 1981, 1982, and 1984 passed bills which would have provided explicitly that alcoholism and drug addiction are not "willful misconduct" under section 1662(a)(1). On all four occasions, the bill met defeat in Conference Committee with the House of Representa-

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[4] Because this is not a case of unavoidable conflict, the VA's observation that in cases of such conflict a more specific statute controls a more general one, *see* Brief for Appellants at 17, is irrelevant.

tives. *See* S. REP. No. 604, 98th Cong., 2d Sess. 38-39 (1984). The Senate would never have proffered such an amendment to section 1662(a)(1), the VA contends, if the Senate had viewed the Rehabilitation Act, once extended to federal programs, as already altering the VA's position that primary alcoholism is in every case and for every purpose "willful misconduct." *See* Reply Brief for Appellants at 6-7.

As the per curiam opinion recognizes, *see* maj. op. at 9-10, the legislative activity emphasized by the VA is not a secure base for judicial decision. The Supreme Court has often observed that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980) (referring to interpretations of an earlier statute contained in later remarks of a Congressman and a committee report accompanying the amendment of a different statute); *United States v. Price*, 361 U.S 304, 313 (1960); *see United States v. Clark*, 445 U.S. 23, 33 n.9 (1980) ("[T]he views of some Congressmen as to the construction of a statute adopted years before by another Congress have '"very little, if any, significance."' *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968) (quoting *Rainwater v. United States*, 356 U.S. 590, 593 (1958)."); *Rainwater v. United States*, 356 U.S. 590, 593 (1958) (amendment of statute by later Congress is "merely an expression of how the [later] Congress interpreted a statute passed by another Congress" and so has "very little, if any, significance").

I see no reason to accord the "subsequent legislative history" underscored by the VA any more weight than usual. I find no indication that Congress, in dealing with the Senate bills, ever even adverted to the question whether the Rehabilitation Act, as extended to federal programs in 1978, already required alteration of the VA standard. As the Sixth Circuit held on precisely this

issue, "we should not read a later Congress' attempt to abolish the willful misconduct standard as 'proof' that an earlier Congress had not already vitiated the willful misconduct standard, as applied by 38 C.F.R. § 3.301(c)(2), by enacting the 1978 amendments to the Rehabilitation Act." *Tinch*, 765 F.2d at 602.[5]

Most forcibly, the VA and the majority argue that if the Rehabilitation Act invalidates the VA's view that "willful misconduct" includes alcoholism in the context of time limits on educational benefits, the Act must also invalidate the position that those same words include alcoholism for the purpose of limiting the availability of service-related disability compensation. *See* 38 U.S.C. § 310. The unacceptable policy consequence of altering the regulatory definition in the latter context is apparent: the VA would have to pay disability compensation to alcoholics as long as they remained alcoholics, thereby deterring alcoholics who could become abstinent from achieving rehabilitation. *See* Brief for Appellants at 14-15; maj. op. at 12-13 n.3.[6]

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[5] The VA also reminds us that a "court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration," especially when "Congress has re-enacted the statute without pertinent change." NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974). The interpretation at issue here, however, is not the VA's longstanding interpretation of § 1662 but its interpretation, mint-new with this case, of the Rehabilitation Act, a statute not within the VA's exclusive province or special competence to administer.

[6] As authority for this argument, the VA relies primarily on a Senate report that accompanied one of the bills to amend § 1662(a)(1). *See* Brief for Appellants at 14. The report stated that the Committee wished to exclude alcoholism from "willful misconduct" in the context of time extensions for educational benefits but not in the context of disability compensation. *See* S. REP. No. 314, 96th Cong., 1st Sess. at 25-26 (1979). Based on this statement, the VA contends that the Committee must have believed that the Rehabilitation Act, had it invalidated the definition in the one context, would

I believe, however, that the Rehabilitation Act indeed does alter the VA's definition for one purpose but not for the other. As the majority recognizes, *see* maj. op at 12-13 n.3, the original regulations issued by HEW to implement the Act,[7] included the provision now codified at 28 C.F.R. § 41.51(c): "[E]xclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicapped persons is not prohibited by [the Act]." 42 Fed. Reg. 22676, 22679 (May 5, 1977) (promulgating the provision as 45 C.F.R. § 84.4(c)). The disability compensation program fits this description: it is limited by federal statute to those with service-related disabilities not attributable to "willful misconduct." In this context, therefore, the Rehabilitation Act does not impact on the VA's view that "willful misconduct" includes alcoholism, because the Act contemplates that programs created to benefit specific classes of handicapped persons may exclude other classes.

By contrast, the VA's educational benefits program surely is not "a program limited by Federal statute to a [specific] class of handicapped persons." Rather, it is a program open to *all* honorably discharged veterans. *See* 38 U.S.C. § 1661(a). The exclusion of alcoholics occurs not in the delineation of the program's scope but only in the restrictions on time extensions for claiming the program's benefits. The discrimination, in other words, is

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also have invalidated it in the other. Nothing in the Senate report, however, remotely indicates that the Committee considered the effect of the Rehabilitation Act at all; the Committee merely wanted to emphasize that although it had decided to make what it considered to be a change in one provision, it did not wish symmetrically to alter a different provision.

[7] The Supreme Court has described these regulations as "an important source of guidance on the meaning of section 504." Alexander v. Choate, 105 S. Ct. 712, 722 n.24 (1985); Consolidated Rail Corp. v. Darrone, 104 S. Ct. 1248, 1254-55 (1984).

not part of the definition of the program but is inserted in a subsection dealing with the program's administration. The former kind of "discrimination" (helping only the handicapped and then, only some of them) is only the special targeting of resources to alleviate certain conditions; the latter kind (helping all veterans but then, dropping out some on the basis of handicap) reflects the sort of hostility that the Rehabilitation Act was designed to correct.

The majority reasons, however, that the "willful misconduct" regulation effects merely the "exclusion of . . . a specific class of handicapped persons from a program limited by federal statute . . . to a different class of handicapped persons" because the "program" from which McKelvey has been excluded is not the educational benefits program in its entirety but only the educational benefits program *after* ten years has elapsed. Maj. op. at 12-13 n.3. The majority cites no authority for this stilted definition, and the notion that the educational benefits program somehow becomes a new and different program after a delay of ten years defies common sense and common use of the term "program." Moreover, like the majority's argument that discrimination against alcoholics is appropriately characterized as discrimination on the basis of conduct, the majority's inclination narrowly to define "program" ultimately will enfeeble the concept "discrimination." If the VA may explain every act of discrimination against alcoholics in favor of other handicapped persons as simply the exclusion of alcoholics from a narrowly defined program, discrimination against alcoholics can never occur in any program for the handicapped.

Unlike the majority's position, my view of the statutory complex advances both the policies underlying the veterans disability compensation statute and those on which the Rehabilitation Act rests. The view I take of the various legislative parts does not require the VA to

pay alcoholics compensation as long as they remain alcoholics, and thus does not create an unfortunate incentive for those individuals. But my reading of the Rehabilitation Act as it impacts on 38 U.S.C. § 1662(a)(1) does assist formerly addicted individuals who have stopped drinking and were never guilty of willful misconduct (judged on a case-by-case basis) to make a new start by gaining or completing an education.

CONCLUSION

The Board of Veterans Appeals itself observed in this case that it had "no doubt that if an extension were granted [McKelvey] would use the benefits wisely and become a more productive member of society." In the Appeal of James P. McKelvey, Findings and Decision (Aug. 6, 1980), J.A. at 34. I believe that Congress' central goal in the Rehabilitation Act was precisely to free handicapped individuals from the kind of discrimination McKelvey encountered so that they could become more productive members of society.

By contrast, the VA's exclusion of rehabilitated alcoholics from consideration for educational benefits time limit extensions, and the majority's sufferance of the VA's policy, annul the intended effect of the Rehabilitation Act. The majority would allow federal agencies simply to label a handicap as falling into some other category contained in the statute entrusted to the particular agency's administration—for example, "willful misconduct." The agency need then demonstrate only that its view is "reasonable." The majority thus entirely abandons the heightened sensitivity to the condition of handicapped persons required by the Rehabilitation Act in favor of the lax standard of rationality to which all agency actions must conform. Because I believe that this mode of analysis frustrates the broad remedial purpose of the Rehabilitation Act, I dissent.

SCALIA, *Circuit Judge, concurring in part and dissenting in part*: While I am as eager as my colleagues are (and, evidently, as the Veterans' Administration initially was) to avoid enmeshing this court once again in the issue of determining the proper scope of § 211(a), *see Gott v. Walters*, 756 F.2d 902 (D.C. Cir. 1985), *vacated and reh'g granted*, No. 82-1159 (D.C. Cir. June 10, 1985), *appeal dismissed as moot*, No. 82-1159 (D.C. Cir. Sept. 20, 1985); and while there is a wicked attractiveness to letting the VA lie in the bed that counsel has made for it; I do not agree with our assertion of jurisdiction in the present case. An administrative officer necessarily "decides" all issues within his competence upon which the lawfulness of his action depends, whether or not he specifically adverts to, or is even aware of them—just as a court necessarily "decides" all issues logically essential to the validity of its holding, whether or not it explicitly addresses or considers them. *See, e.g., Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979). I think § 211(a) uses the phrase "decisions of the Administrator" in this sense. It is a most unlikely estimation of congressional intent, and one with troublesome policy consequences, that the Administrator should be able to control the scope of judicial review of his determinations by simply designating which underlying issues he chooses not to decide. Since there is no conceivable reason why the Administrator was unauthorized, or indeed anything less than *obliged*, to decide how the Rehabilitation Act affected the present adjudication—regardless of whether his decision had to be made with deference, or even with absolute subservience, to the views of another executive official—it seems to me that in addressing that point we are reviewing a decision of the Administrator, in violation of § 211(a). I would therefore dispose of this case, as the Second Circuit has recently disposed of a virtually identical appeal, by dismissing for lack of jurisdiction. *See Traynor v. Walters*,

No. 85-6208 (2d Cir. May 16, 1986), *rev'g Traynor v. Walters*, 606 F. Supp. 391 (S.D.N.Y. 1985).

Since, however, the majority of the court has determined otherwise, I have joined in the court's consideration of the merits, and concur in Parts I and III of the opinion.

APPENDIX B

United States District Court

FOR THE DISTRICT OF COLUMBIA

JAMES P. MCKELVEY, *Plaintiff.* v. HARRY N. WALTERS, Administrator of Veterans Affairs, *et al.*, *Defendants.*	Civil Action No. 83-2063 Filed October 19 1984 James E. Davey, Clerk

MEMORANDUM OPINION

Barrington D. Parker, District Judge:

The plaintiff, James P. McKelvey, a former alcoholic, challenges the Veterans Administration's ("V.A.") denial of his request for an extension of the cut-off date for the use of his educational benefits as an honorably discharged veteran. McKelvey's request was denied because the V.A., relying upon a regulation prohibiting extensions on the basis of "willful misconduct," 38 C.F.R. § 3.301(c)(2), considered that his alcoholism was the result of his own willful misconduct.

The issue now presented for determination by the Court is whether the regulation is arbitrary, irrational and exceeds the agency's statutory authority by denying lawful benefits to veterans who suffer from alcoholism. The plaintiff's challenge arises under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), and the due process and equal protection prongs of the Fifth Amendment. The plaintiff's

challenge also calls for consideration of his claim that in denying his request for relief, his rights under the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination against alcoholics, were violated.

This matter comes before the Court on cross motions for summary judgment filed by the parties and the defendants' motion to dismiss. The Court determines that the V.A. regulation, 38 C.F.R. § 3.301(c)(2), discriminates against alcoholics in violation of the Rehabilitation Act. Summary judgment is therefore granted to the plaintiff on this claim.

FACTUAL BACKGROUND

The facts in this case are essentially undisputed. In 1977, Mr. McKelvey applied for veterans' education benefits pursuant to 38 U.S.C. § 1661. As the result of his service in the United States Army, he was entitled to thirty-six months of benefits, *id.*, so long as he utilized them within ten years of his discharge from active duty. 38 U.S.C. § 1662(a)(1). He was honorably discharged from the Army on September 9, 1966. Thus, he was required to utilize his benefits prior to September 10, 1976, unless he "was prevented from initiating or completing [his] education . . . because of a physical or mental disability which was not the result of [his] own willful misconduct." *Id.* In his 1977 application for such benefits, he sought an extension of the September 1976 deadline on the grounds that his alcoholism had prevented him from using the benefits earlier.[1]

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[1] The Court is pleased to note that the plaintiff has apparently conquered his drinking problem. He reports that he has abstained from alcohol since 1975 and has been employed full time for a considerable period. During the past four years, he has been employed as an alcoholism counselor by Montgomery County, Maryland.

On May 1, 1978, the regional office of the Veterans Administration denied Mr. McKelvey's request for an extension. That office informed him that an extension was unwarranted because his alcoholism constituted "willful misconduct." Under the governing law, any disease which follows from an individual's "willful misconduct" precludes an extension of the ten-year delimiting date. The regional office accepted McKelvey's admission that he was an alcoholic, but made no additional findings of fact. The plaintiff appealed this decision to the Board of Veterans Appeals ("Board"), and after a hearing, the appeal was denied on August 6, 1980.

The Board found that the plaintiff did not suffer from an underlying psychiatric problem which gave rise to his alcoholism, and that his alcoholism did not cause a separate disability which by itself would support an extension. In reaching this decision, the Chairman of the Board stated that 38 C.F.R. § 3.301(c)(2)[2] precluded consideration of any evidence concerning the plaintiff's alcoholism other than:

> evidence that the alcoholism may have been secondary to a psychiatric or organic condition of some kind . . . or alternatively, [evidence] that there were other conditions either psychiatric or organic which in themselves would have precluded

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[2]Section 3.301(c)(2) provides:

Alcoholism. The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

> [him] from pursuing a course of education during the relevant period.

Memorandum of Law in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment ("Defendants' Memorandum"), Ex. 6, Tab I at 15-16. In essence, the Board found that the plaintiff suffered from primary alcoholism, and concluded that his request for an extension must be denied. *Id.*, Tab H at 6.

On February 23, 1982, the Board affirmed its earlier decision on reconsideration, and on July 20, 1983, the plaintiff filed this complaint challenging the denial of his request for an extension.

LEGAL ANALYSIS

A. JURISDICTION

Initially, the Court must resolve the defendants' contention that 38 U.S.C. § 211(a)[3] bars judicial review of the Board's decision, and deprives this Court of jurisdiction over the statutory issues raised in the plaintiff's complaint. Here, the plaintiff does not seek review of any factual findings of the Veterans Administration; instead, he seeks a judicial determination that a regulation promulgated by the V.A. is contrary to Section 504 of the Rehabilitation Act, 29 U.S.C.

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[3]Section 211(a) provides in relevant part that:

> the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision . . . .

§ 794 and exceeds the agency's statutory authority.[4] Thus, the issue presented is a narrow one: whether section 211(a) deprives a federal court of jurisdiction over a purely legal challenge to a V.A. regulation which asserts that the regulation is contrary to other federal statutes.

Although the issue is narrowly circumscribed, it is by no means simple. In *Kirkhuff* v. *Nimmo*, 683 F.2d 544, 548 (D.C. Cir. 1982), the Court reversed the lower court's finding that a V.A. regulation was arbitrary and capricious. In deciding the case on the merits, the Court deftly avoided deciding what it termed the "difficult question" of "[t]he extent to which Veterans Administration decisions are exempt from [judicial] review." *Id.*[5] Thus, the court avoided confronting the lower court's determination that section 211(a) did not bar jurisdiction over the plaintiff's statutory challenges. *Kirkhuff* v. *Cleland*, 516 F. Supp. 351, 360 (D.D.C. 1981).

A number of other circuits have considered whether section 211(a) divests federal courts of jurisdiction over nonconstitutional challenges to V.A. regulations, and a majority have held this section does not prevent judicial review of challenges to the V.A.'s authority to promulgate regulations. *See, e.g., Evergreen State College* v. *Cleland*, 621 F.2d 1002, 1008 (9th Cir. 1980); *University of Maryland* v. *Cleland*, 621 F.2d 98, 100-01 (4th Cir. 1980); *Merged Area X (Education)* v. *Cleland*, 604 F.2d 1075, 1078 (8th Cir. 1979); *Wayne State University* v. *Cleland*,

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[4] Although the plaintiff also asserts equal protection and due process claims, the Court declines to decide these issues under the established principle that unnecessary adjudication of constitutional issues should be avoided. Ashwander v. TVA, 297 U.S. 288, 347 (1933).

[5] Despite its reluctance to consider the jurisdictional issue, the Court apparently accepted the availability of judicial review in the "constitutional arena." *Id.*; *see* Ralpho v. Bell, 569 F.2d 607, 620 (D.C. Cir. 1977).

590 F.2d 627, 631 (6th Cir. 1978). *Contra Anderson* v. *Veterans Administration*, 559 F.2d 935, 936 (5th Cir. 1977). The seminal case upholding jurisdiction is *Wayne State*, where the Sixth Circuit explicitly found that it had the power to consider a claim that a V.A. regulation governing veterans' education benefits was promulgated without statutory authority. 590 F.2d at 629-31.

This Court adopts the reasoning of the *Wayne State* decision and its progeny, and finds that it has jurisdiction over the plaintiff's statutory challenges. The specific *Wayne State* holding that a court has jurisdiction to consider whether the V.A. has exceeded its statutory authority applies with equal force in this case. Moreover, the court's rationale for exercising jurisdiction over the Administrative Procedure Act claim provides even stronger support for jurisdiction over the Rehabilitation Act claim in this case. Under *Wayne State*, judicial review is permissible where it would neither "involve the courts in the *complex and technical niceties of V.A. policy*," 590 F.2d at 632 (emphasis added), nor "spawn suits requesting federal courts to second guess the Administrator on *the merits of particular claims for benefits* or the termination of such benefits." *Id.* at 631 (emphasis added).

Here, the plaintiff's challenge is not limited to a *particular* claim for benefits, but instead, raises the broader legal issue of whether a V.A. regulation of general application violates a federal statute. Moreover, the federal statute in question is completely independent of the complex statutory and regulatory scheme for dispersing veterans' benefits. This means that the Veterans Administration has no special expertise in measuring the validity of its regulations against the Rehabilitation Act. Accordingly, this Court will exercise jurisdiction over the statutory claims presented by the plaintiff, and turn to the merits of his contentions.

B. PROPRIETY OF THE WILLFUL MISCONDUCT REGULATION UNDER THE ADMINISTRATIVE PROCEDURE ACT

Plaintiff's counsel argues that the willful misconduct regulation prohibits a finding that primary alcoholism is a disease, and preempts Congress' directive that extentions of delimiting dates shall be granted "in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education . . . because of a physical or mental disability which was not the result of such veteran's own willful misconduct." 38 U.S.C. § 1662(a)(1). Thus, the plaintiff contends that the regulation exceeds the V.A's statutory authority and is "arbitrary, capricious, . . . or otherwise not in accordance with law" within the meaning of the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2)(A).

Despite the defendants' arguments to the contrary, the plaintiff correctly states that the language of the willful misconduct regulation and its application by the Board precludes a determination that primary alcoholism is a disease which permits an extension of the delimiting dates. Under the language of 38 C.F.R. § 3.301(c)(2), willful misconduct is conclusively presumed "[i]f in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death." Moreover, the Veterans Administration has also adopted an interpretation which is consistent with this analysis. As the chairman of the hearing conducted by the Board in July 1980 explained:

> As far as we are concerned at the Board [ ], we don't have discretion to say that primary alcoholism is a disease . . . . [W]e have no authority to do that, we're bound by those regulations.

Defendants' Memorandum, Ex. 6, Tab I at 16.

While section 3.301(c)(2) singles out alcoholism for disfavored treatment, it does not contravene any implicit or explicit congressional intent. Contrary to the plaintiff's contention, the statute does not mandate that a finding of "willful misconduct" must turn on an issue of fact. Rather, the statute is silent on the parameters of "willful misconduct," and the V.A. has promulgated regulations, including section 3.301(c)(2), which are intended to give meaning to the term.

In the absence of a more explicit congressional directive, this promulgation is clearly within the agency's

> . . . authority to make all rules and regulations which are necessary or appropriate to carry out the law administered by the Veterans Administration and are consistent therewith . . . .

38 U.S.C. § 210(c)(1). As this Circuit has noted, section 210(c)(1) gives the V.A. "the primary responsibility for interpreting and applying the various veterans' benefits statutes." *Kirkhuff* v. *Nimmo*, 683 F.2d at 549. The appropriate standard of review for the V.A.'s construction of a veterans' benefit statute is thus:

> whether the [agency's] construction was 'sufficiently reasonable' to be accepted by a reviewing court . . . . To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.

Id. (*citing FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 46 (1981)).

Here, the V.A.'s construction of the statute would pass muster even under a less deferential standard of review. The

legislative history of Pub. L. No. 95-202, 91 Stat. 1433, the statute which adopted the exception to the utilization of education benefits within ten years of military discharge, shows Congress' intent to incorporate the Veterans Administration's existing interpretation of "willful misconduct" into existing law. The report of the Veterans' Affairs Committee stated that in determining willful misconduct:

> the Committee intends that the same standards be applied as are utilized in determining eligibility for other VA programs under title 38. In this connection, see 38 C.F.R., part III, paragraphs 3.1(n) and 3.301 . . . .

S. Rep. No. 468, 95th Cong., 1st Sess. 69-70, *reprinted in* 1977 U.S. Code Cong. & Ad. News 3747, 3805-06. This passage indicates that Congress believed that the V.A.'s construction of willful misconduct was the proper one.

Even if the statement in the Senate report can be discounted as but a single, isolated instance of congressional acceptance of the V.A.'s interpretation, this Court must defer to the agency's construction of the statute because Congress has never overridden this interpretation. *Kirkhuff* v. *Nimmo*, 683 F.2d at 549. Here, deference is due because Congress has not repudiated the V.A.'s construction of the "willful misconduct" regulation, which was promulgated before the enactment of 38 U.S.C. § 1662. In fact, the Senate has affirmed the V.A.'s longstanding interpretation of willful misconduct, stating that "in light of the legislative history, the V.A. has had little choice but to deny such extensions involving alcohol and drug abuse or addiction disabilities." S. Rep. No. 314, 96th Cong., 1st Sess. 9, 25 (1979).

Moreover, Congress has subsequently rejected attempts to amend the statute to provide that primary alcoholism is not *per se* willful misconduct. Although the Senate

Veterans' Affairs Committee proposed an amendment (S.870) to 38 U.S.C. § 1662(a)(1) which would have removed recovered alcoholics from the scope of a *per se* finding of willful misconduct, *see* S.Rep. No. 314, 96th Cong., 1st Sess. (1979), the Veterans' Affairs Committees of both houses reached a compromise on the bill which rejected this amendment. 126 Cong. Rec. 27,355 (joint explanatory statements of Veterans' Rehabilitation and Education Amendment of 1980) ("joint statement"), 27,578 (remarks of Sen. Cranston), 27,585 (joint statement) (1980). The compromise agreement was enacted on October 17, 1980 as Pub. L. 96-466, 94 Stat. 2171.

A similar scenario occurred in 1981, when Senator Cranston introduced an amendment (S. 458) which would have "put alcohol and drug disabilities on essentially the same footing as other disabilities with respect to delimiting and eligibility period restrictions." A bill containing this amendment was passed by the Senate on June 16, 1981, but a compromise between the two Veterans' Affairs Committees once again eliminated the amendment. 127 Cong. Rec. H6814 (daily ed. Oct. 2, 1981).

C. THE WILLFUL MISCONDUCT REGULATION VIOLATES THE REHABILITATION ACT

1.

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, proscribes discrimination in federal programs and grants and provides that:

> No otherwise qualified handicapped individual in the United States, as defined in section 7(7) [29 U.S.C. § 706(7)], shall, solely by reason of his handicap, . . . be subjected to discrimination

> under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service . . . .

In 1978, Congress amended Section 505(a)(2) of the Rehabilitation Act, by specifically providing that:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d *et seq.*] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 U.S.C. § 794].

29 U.S.C. § 794a(a)(2). Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. § 2000d, bars a wide variety of discrimination in programs receiving federal financial assistance.[6]

Although the majority of cases litigated under section 504 have alleged employment discrimination, *see, e.g., Consolidated Rail Corp.* v. *Darrone*, 104 S.Ct. 1248, 1254 n.13 (1984), the discrimination prohibited under section 504 is by no means confined to employment discrimination claims. *See, e.g., Smith* v. *Robinson*, 104 S.Ct. 3457, 3473 n.22 (1984) (education discrimination).

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[6] The antidiscrimination provisions of Title VI provide that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

2.

In this case, Mr. McKelvey asserts that he suffered discrimination on the basis of his handicap by virtue of a V.A. regulation which treats primary alcoholism differently than other disabilities for purposes of granting extensions of the ten-year delimiting period. As an alcoholic, he is an "otherwise qualified handicapped individual" within the meaning of the Rehabilitation Act, 29 U.S.C. § 706(7)(B), and is protected from discrimination solely on the basis of this status. 43 Op. Atty. Gen. No. 12, at 2 (April 12, 1977).

Moreover, the willful misconduct regulation discriminates against McKelvey on the basis of his handicap: primary alcoholism. The Board's interpretation of the regulation precluded it from considering relevant evidence which was causally related to his handicap. For instance, the fact that he began drinking alcohol at age 13 and other information concerning his family's history of alcoholism were considered evidence of primary alcoholism, and could not legally rebut the presumption of willful misconduct. This interpretation means that a showing that an individual suffers from alcoholism as a primary disease, without an accompanying psychiatric disorder or secondary illness, could never overcome the presumption of willful misconduct.

On the other hand, other individuals who seek an extension of the ten-year delimiting date are not conclusively presumed to be guilty of willful misconduct. With respect to nonalcoholics, willful misconduct "involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 38 C.F.R. § 3.1(n)(1). These individuals, unlike alcoholics, are not required to prove the existence of a secondary disease in order to escape a finding of willful misconduct with respect

to their primary condition. Thus, the conclusive presumption of willfulness is directed at alcoholics, [7] and constitutes discrimination on the basis of handicap.

Given that the V.A. regulation discriminates against Mr. McKelvey and other primary alcoholics, the Court next considers the government's justification for its overtly discriminatory policy. At a minimum, the government must assert a rational justification for any policy which discriminates on the basis of handicap. *See Jennings* v. *Alexander*, 715 F.2d 1036, 1044 (6th Cir. 1983) (disparate impact analysis). Where a regulation facially discriminates against a class of individuals on the basis of their handicap, it is at least arguable that the government must satisfy a greater burden of proof — such as a substantial justification for its discriminatory policies. For instance, in *Shirey* v. *Devine*, 670 F.2d 1188, 1204 (D.C. Cir. 1982), the Court held that section 501 of the Rehabilitation Act, 29 U.S.C. § 791, does not permit disparate treatment absent a "substantial governmental justification." Here, even if the government is only required to articulate a rational justification, the V.A.'s three asserted justifications for the "willful misconduct" regulation are grossly deficient. The sufficiency of these justifications may be resolved on motions for summary judgment. *See Shirey* v. *Devine*, 670 F.2d at 1191, 1203-04.

First, the government argues that the regulation represents the V.A.'s reasonable determination that alcoholism is a voluntary handicap. Second, the government argues that an irrebuttable presumption that alcoholism is a voluntary

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[7] A few other luckless individuals, such as drug addicts, are also covered by special provisions governing "willful misconduct." *See* 38 C.F.R. § 3.301(c)(3), 3.302.

condition will reduce problems of proof. Third, the government contends that financial resources for veterans are limited, and administrative cost considerations justify differential treatment of alcoholics.

None of these reasons adequately supports discrimination against individuals who suffer from alcoholism as a primary disease. While the contention that alcoholism is a voluntary handicap is superficially plausible, it is factually incorrect because the regulation itself permits a finding of "involuntariness" if alcoholism is accompanied by an additional disability. Moreover, the arguments with respect to questions of proof and cost savings miss the mark entirely. A regulation which forbid *all* handicapped persons from receiving education benefits would even more clearly meet the objective of cost savings, but it cannot be seriously argued that such a practice would satisfy the requirements of the Rehabilitation Act.

In the absence of some justification for the V.A.'s discriminatory practices, the willful misconduct regulation, as applied to primary alcoholics, violates the Rehabilitation Act. The Court notes that this conclusion is fully supported by the recent well-reasoned decision in *Tinch* v. *Walters*, 573 F. Supp. 346, 348 (E.D. Tenn. 1983), *appeal docketed*, No. 83-5926 (6th Cir. Dec. 12, 1983), where the Court also determined that the V.A.'s application of the willful misconduct regulation violated the Rehabilitation Act.

This Court's findings under the Rehabilitation Act make short shrift of the government's argument that sovereign immunity bars the plaintiff's claim for benefits The relief available under section 505(a)(2) of the Act, 29 U.S.C. § 794a(a)(2), includes a claim for back pay, *Consolidated Rail Corp.* v. *Darrone*, 104 S.Ct. at 1252, and by analogy, also includes a claim for education benefits wrongfully withheld. Thus, the doctrine of sovereign immunity

does not apply in this case because the government has consented to suit. *Frazier* v. *Merit Systems Protection Board*, 672 F.2d 150, 168 (D.C. Cir. 1982).

CONCLUSION

The plaintiff should prevail on his claim that the willful misconduct regulation, 38 C.F.R. § 3.301(c)(2), violates the Rehabilitation Act. The willful misconduct regulation, however, does not exceed the defendants' statutory authority under 38 U.S.C. § 210(c)(1), nor is it contrary to 38 U.S.C. § 1661 or 1662(a)(1). The Court reaches no conclusion with respect to the constitutional issues raised in the plaintiff's complaint.

In light of the above findings, this case is remanded to the Veterans Administration for consideration of whether the plaintiff's alcoholism constituted "willful misconduct" within the meaning of the statute. *Kirkhuff* v. *Cleland*, 516 F. Supp. at 369. Although the V.A. improperly denied McKelvey benefits on the basis of the willful misconduct regulation, the agency must still determine whether the plaintiff is entitled to benefits, notwithstanding the invalid regulation. Under 38 U.S.C. § 211(a), this determination is within the exclusive purview of the V.A., and is not subject to judicial review.

An appropriate Order accompanies this Memorandum Opinion.

ENTERED: October 19, 1984

BARRINGTON D. PARKER
United States District Judge

United States District Court

FOR THE DISTRICT OF COLUMBIA

JAMES P. MCKELVEY, *Plaintiff.* v. HARRY N. WALTERS, Administrator of Veterans Affairs, *et al.*, *Defendants.*	Civil Action No. 83-2063 Filed October 19 1984 James E. Davey, Clerk

ORDER

Based on the accompanying Memorandum Opinion, it is this 19th day of October, 1984,

ORDERED

that the plaintiff's motion for summary judgment is granted insofar as it seeks relief with respect to his claim that 38 C.F.R. § 3.301(c)(2) violates the Rehabilitation Act, and judgment is entered for the plaintiff with respect to this claim;

That the defendants' motion for summary judgment is granted on the claim that the regulation does not exceed the statutory authority of the Veterans Administration, and judgment is entered for the defendants with respect to this claim;

That this case is remanded to the Veterans Administration for a determination of whether the plaintiff is entitled to benefits, notwithstanding 38 C.F.R. § 3.301(c)(2);

This proceeding is hereby dismissed with prejudice.

/s/ Barrington D. Parker

BARRINGTON D. PARKER,
UNITED STATES DISTRICT JUDGE

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES P. MCKELVEY, *v.* THOMAS K. TURNAGE, Administrator of Veterans' Affairs, and VETERANS' ADMINISTRATION, *Appellants*	September Term, 1985 Civil Action No. 83-2063 Filed May 30, 1986 George A. Fisher, Clerk

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BEFORE: GINSBURG, SCALIA AND STARR, Circuit Judges

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court appealed from in this cause is hereby reversed and this case is remanded, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER, CLERK

Date: May 30, 1986
Opinion Per Curiam.
Opinion concurring in part and dissenting in part filed by Circuit Judge Ginsburg.
Opinion concurring in part and dissenting in part filed by Circuit Judge Scalia.

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES P. MCKELVEY, *v.* HARRY N. WALTERS, Administrator of Veterans' Affairs, et al.	September Term, 1985 No. 84-5910 Filed August 7, 1986 George A. Fisher, Clerk

BEFORE: GINSBURG, SCALIA AND STARR, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing, filed July 14, 1986, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
By The Court

GEORGE A. FISHER, CLERK

By: /s/ Robert A. Bonner
ROBERT A. BONNER,
CHIEF DEPUTY CLERK

Circuit Judge Ginsburg would grant the petition for rehearing.

APPENDIX E

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES P. MCKELVEY, *v.* HARRY N. WALTERS, Administrator of Veterans Affairs, et al.	September Term, 1985 No. 84-5910 Filed August 7, 1986 George A. Fisher, Clerk

BEFORE: WALD, Chief Judge; ROBINSON, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA, STARR, SILBERMAN, BUCKLEY AND WILLIAMS, Circuit Judges

ORDER

Appellee's suggestion for rehearing *en banc* was circulated to the full Court and the taking of a vote thereon was requested. A majority of the judges of the Court in regular, active service did not vote in favor of the suggestion. Accordingly, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
By The Court

GEORGE A. FISHER, CLERK

By: /s/ Robert A. Bonner
ROBERT A. BONNER,
CHIEF DEPUTY CLERK

Circuit Judges Robinson, Mikva, Edwards and Ginsburg would grant the suggestion for rehearing *en banc*.

Supreme Court, U.S.
FILED
FEB 20 1987
CLERK

Nos. 86-622 and 86-737

In the Supreme Court of the United States

OCTOBER TERM, 1986

EUGENE TRAYNOR, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS AFFAIRS AND VETERANS ADMINISTRATION

JAMES P. MCKELVEY, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS AFFAIRS AND VETERANS ADMINISTRATION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 38 U.S.C. 211(a) precludes judicial review of a decision by the Veterans Administration denying a veteran's application to extend the statutory period within which the veteran may receive educational benefits.

2. Whether, if we assume that judicial review is not barred, the denial of benefits in these cases violated the Rehabilitation Act, 29 U.S.C. 794.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-622

EUGENE TRAYNOR, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS AFFAIRS AND VETERANS ADMINISTRATION

No. 86-737

JAMES P. MCKELVEY, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS AFFAIRS AND VETERANS ADMINISTRATION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND AND DISTRICT OF COLUMBIA CIRCUITS

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 86-622 (Pet. App. 1a-38a) is reported at 791 F.2d 226. The opinion of the district court in No. 86-622 (Pet. App. 39a-82a) is reported at 606 F. Supp. 391. The opinion of the court of appeals in No. 86-737 (Pet. App. 1a-31a) is reported at 792 F.2d 194. The opinion of the district court in No. 86-737 (Pet. App. 32a-47a) is reported at 596 F. Supp. 1317.

JURISDICTION

The judgment of the court of appeals in No. 86-622 was entered on May 16, 1986. A petition for rehearing was denied on July 15, 1986 (Pet. App. 86a-87a). The petition

for a writ of certiorari was filed on October 14, 1986 (a Tuesday following a legal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the court of appeals in No. 86-737 was entered on May 30, 1986. A petition for rehearing was denied on August 7, 1986 (Pet. App. 49a). The petition for a writ of certiorari was filed on November 5, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

38 U.S.C. 211(a) provides, in pertinent part:

> On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus of otherwise.

Section 203 of the G.I. Bill Improvement Act of 1977, Pub. L. No. 95-202, Tit. II, 91 Stat. 1439, 38 U.S.C. (Supp. I 1977) 1662 provided, in pertinent part:

> (a)(1) No educational assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall, upon application, be

granted an extension of the applicable delimiting period for such length of time as the Administrator determines, from the evidence, that such veteran was prevented from initiating or completing such program of education.

* * * * *

(e) No educational assistance shall be afforded any eligible veteran under this chapter or chapter 36 of this title after December 31, 1989.

38 C.F.R. 3.301(c)(2) provides:

Alcoholism. The simple drinking of alcoholic beverages is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

STATEMENT

1. The Veterans Benefits Law authorizes the payment of educational benefits to veterans within ten years following the date of discharge. No educational assistance may be paid after that ten-year period expires unless the veteran was unable to pursue an education within that period "because of a physical or mental disability which was not the result of such veteran's own willful misconduct." 38 U.S.C. 1662(a)(1). In the cases presently before the Court, petitioners are veterans who did not receive full

educational benefits during their respective ten-year periods. In each case, petitioner sought to extend his period of eligibility, contending that he was disabled during part of the ten-year period because of alcoholism. The Veterans Administration (VA) denied extensions to both petitioners in accordance with its longstanding policy that alcoholism not resulting from an underlying psychiatric disorder constitutes "willful misconduct."

The applicable VA regulation (38 C.F.R. 3.301(c)(2)), promulgated in 1972, was designed to incorporate principles set forth in greater detail in a 1964 VA administrative decision. 38 Fed. Reg. 20335-20336 (1972) (proposed regulation); 37 Fed. Reg. 24662 (1972) (final regulation).[1] The 1964 administrative decision, drawing on VA benefits decisions dating back to 1931, distinguishes between "primary" alcoholism and alcoholism that is "secondary to and a manifestation of an acquired psychiatric disorder" (Administrator's Decision, Veterans Administration No. 988, Interpretation of the Term "Willful Misconduct" As Related To The Residuals of Chronic Alcoholism (Aug. 13, 1964) (86-622 Pet. App. 139a, 143a-144a)). Such "secondary" alcoholism is not considered willful misconduct (*id.* at 144a). Nor does the 1964 VA decision regard as the product of willful misconduct any organic disorder caused by chronic alcoholism, such as cirrhosis of the liver. "While it is proper to hold a person responsible for the direct and immediate results of indulgence in alcohol, it cannot be reasonably said that he expects and *wills* the disease and disabilities which sometimes appear as secondary effects." *Id.* at 145a (emphasis in original).

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[1] A companion provision (38 C.F.R. 3.301(c)(3)) establishes similar standards for determining when drug usage constitutes willful misconduct.

2. *No. 86-622*: Traynor was discharged from the Army on August 27, 1969. He entered college in 1977 and received veterans' education assistance benefits until those benefits were terminated when his ten-year period of eligibility expired on August 27, 1979. Traynor, who had used nine and one-half of the 24 months of benefits available to him (based on length of service), sought to have his period of eligibility for benefits extended. He contended that he had been unable to utilize his full benefits within ten years of discharge because he had suffered from alcoholism for 15 years ending in 1974.

During the administrative proceedings, Traynor asserted that the VA regulation setting forth the circumstances in which alcoholism constitutes willful misconduct is violative of the Rehabilitation Act, 29 U.S.C. 794. The Board of Veterans Appeals did not expressly adjudicate that statutory claim, noting that it was bound by VA regulations. The Board did, however, explain that the consistent VA policy (86-622 Pet. App. 117a) is:

> [t]hat alcoholism can and should be considered an illness for purposes of medical treatment and rehabilitation, and that the simple drinking of any alcoholic beverage is not in and of itself willful misconduct. On the other hand, if in the consumption of alcohol for the purpose of enjoying its intoxicating effects excessive indulgence leads to disability, such disability will be considered the result of the person's willful misconduct.

Noting that "Congress has never enjoyed the luxury of having unlimited funds with which to provide for gratuitous Veterans Administration benefits," the Board explained that historically benefits have not been granted for a disability that results from willful misconduct (*id.* at 117a-118a). The Board observed that alcoholism has been

regarded as potentially disqualifying misconduct ever since the earliest veterans regulations promulgated by President Roosevelt. It added that (*id.* at 118a-119a):

> Since then, a distinction has been maintained between fortuitously incurred disease or disability, for which gratuitous Veterans Administration benefits may be afforded, and other nonfortuitous disabilities incurred at the hands of the claimant himself/herself. Alcoholism is not singled out for special consideration; other disabilities may be considered the result of willful misconduct, under appropriate circumstances. Whether the illness i[n] question is alcoholism or some other disability, the Veterans Administration evaluates the circumstances of each individual in determining willful misconduct.

Finding no error in its prior determination that the facts of this case warranted a finding of willful misconduct, the Board denied Traynor's request for benefits beyond the delimiting date.

Traynor then filed suit in the United States District Court for the Southern District of New York. He alleged that the VA decision was violative of the Rehabilitation Act, the Due Process Clause and the Equal Protection component of the Fifth Amendment. The district court held that "[s]ince [the complaint] requires us to examine constitutional and statutory questions and not merely issues of VA policy, we conclude, in accordance with the Supreme Court's holding in *Johnson* [v. *Robison*, 415 U.S. 361 (1974)], that we are not precluded from exercising our jurisdiction in this matter by 38 U.S.C. § 211(a)." 86-622 Pet. App. 58a-59a. On the merits, the district court rejected the constitutional challenge (*id.* at 59a-64a), but held that the VA decision violated the Rehabilitation Act. The court held that alcoholism is a handicap covered by

the Rehabilitation Act (*id.* at 69a-72a), and that the denial of benefits constitutes discrimination against alcoholics forbidden by that Act.

The court of appeals for the Second Circuit reversed. The panel majority held that judicial review of the Rehabilitation Act issue was precluded by 38 U.S.C. 211(a). The court stated (86-622 Pet. App. 16a-17a) that although "many veterans have in the service of our country suffered injuries that qualify them as 'handicapped individual[s]' for purposes of Section 504 [of the Rehabilitation Act] * * * Congress did not delineate any exception to section 211(a) for 'handicapped' veterans when it passed section 504." Thus, the court explained, there was no basis for concluding that Congress intended "to grant to 'handicapped' veterans the judicial review traditionally denied all other veterans." 86-622 Pet. App. 17a.

Judge Kearse dissented on the jurisdictional issue.[2] In her view, Section 211(a) does not bar judicial review because the Rehabilitation Act neither provides benefits to veterans nor is it administered by the VA (86-622 Pet. App. 32a). In addition, Judge Kearse deemed Section 211(a) to be inapplicable here because there was no decision of the Administrator on the Rehabilitation Act issue, the Board of Veterans Appeals having "refused, on the ground of lack of authority, to decide whether the challenged regulations violated the Rehabilitation Act" (86-622 Pet. App. 36a).

3. *No. 86-677*: Petitioner McKelvey was discharged from the Army in September 1966. During the next nine years he was hospitalized at various times for alcoholism and associated conditions. He did not apply for veteran's educational benefits until more than 10 years had elapsed following his discharge. The VA, finding "no evidence that an acquired psychiatric disease preceded [McKelvey's]

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[2] She expressed no view on the merits (86-622 Pet. App. 38a).

alcoholism" (86-737 Pet. App. 5a), denied his request to extend his period of eligibility and rejected his application for benefits.

McKelvey filed suit in the United States District Court for the District of Columbia. He challenged his denial of benefits on the ground that it was based on a misconstruction of the "willful misconduct" language of the veterans benefits statute. He contended also that the VA decision constituted discrimination against the handicapped in violation of the Rehabilitation Act, an argument he had not presented in the administrative proceedings.

The district court held that it had jurisdiction to consider McKelvey's claims, stating that Section 211(a) "does not prevent judicial review of challenges to the VA's authority to promulgate regulations." 86-737 Pet. App. 36a. On the merits, the district court held that the VA had properly interpreted the "willful misconduct" standard of the veterans' benefits statute. The court noted that when Congress enacted the educational benefits extensions, the VA interpretation of "willful misconduct" already existed (in connection with earlier provisions on disability compensation), and that Congress specifically expressed an intent that the same interpretation be used (*id.* at 40a, quoting S. Rep. 95-468, 95th Cong., 1st Sess. 69-70 (1977)). The district court reached a different conclusion on the Rehabilitation Act claim, holding that the VA interpretation constitutes discrimination against alcoholics in violation of Section 504. 86-737 Pet. App. 43a.

The court of appeals for the District of Columbia Circuit reversed. The court held that while Section 211(a) does not preclude judicial review of the Rehabilitation Act claim, petitioner's substantive statutory claim has no merit.

The court of appeals' decision on the jurisdictional issue rests on "the unusual, perhaps *sui generis* posture of this case" (86-737 Pet. App. 6a). The court focused on two

particular facts: first, that a veteran is challenging the validity of a regulation under the Rehabilitation Act, a legal issue the Board of Veterans Appeals regarded itself as lacking authority to decide, and second, that the VA had not otherwise made a determination on that issue prior to the filing of this lawsuit[3] (*id.* at 7a). Since, in the court's view, Section 211(a) is applicable only when a claim has been "resolved by an actual 'decision of the Administrator' " (*ibid.*, quoting *Johnson* v. *Robison*, 415 U.S. 361, 367 (1974)), it does not bar judicial review in these circumstances. The court emphasized "the narrowness of our holding" (86-737 Pet. App. 9a):

> [W]e do not anticipate another occasion to review a VA order on the basis that supports our review today. The VA has now determined it does have authority to decide on the effect and applicability of federal statutes other than veterans' legislation when the agency acts on benefits claims. We therefore expect that the VA will not again regard as outside the arsenal of law it applies any potentially relevant congressional enactment.

On the merits, the court concluded that the VA could reasonably distinguish between those whose handicap was caused by their own willful misconduct, and those who are not responsible for their handicap. The VA's conclusion that alcoholics who cannot show an underlying psychiatric disorder are chargeable with willful misconduct reflects "general societal perceptions regarding personal responsibility." 86-737 Pet. App. 12a. Moreover, since

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[3] In response to the court's request at oral argument, the General Counsel of the VA took the position that the Rehabilitation Act does not invalidate the VA's interpretation of the "willful misconduct" language in Section 1662. The court held, however, that the General Counsel's letter did not constitute a "decision of the Administrator" for purposes of Section 211(a), since it was written after the case started. 86-737 Pet. App. 7a-8a.

"[a]lcoholism, unlike any other disability except drug addiction * * *, is self-inflicted * * * [,] [i]t is therefore feasible for alcoholism, as it is not for all other disabilities except drug addiction, to make a generalized determination that willfulness exists unless there is established the singular exculpation for self-infliction (psychiatric disorder) that the agency has chosen to acknowledge" (*id.* at 16a).

In a separate opinion, Judge Ginsburg concurred in the court's holding that Section 211(a) does not bar judicial review in the unique circumstances of this case, and she dissented from the court's holding on the merits (86-737 Pet. App. 17a).

Judge Scalia also wrote separately. He dissented from the court's holding that Section 211(a) is not applicable, stating that the "decision of the Administrator" which Section 211(a) immunizes from judicial review necessarily includes all issues within the competence of the agency to decide, "whether or not [the agency] specifically adverts to, or is even aware of them—just as a court necessarily 'decides' all issues logically essential to the validity of its holding, whether or not it explicitly addresses or considers them." 86-737 Pet. App. 30a. Any other view of Section 211(a), he wrote, would enable "the Administrator * * * to control the scope of judicial review of his determinations by simply designating which underlying issues he chooses not to decide" (86-737 Pet. App. 30a). Judge Scalia concurred in the court's decision on the merits, upholding the validity of the VA regulation.

ARGUMENT

The judgments of the courts of appeals are correct and do not conflict with any decision of this Court. Although the courts of appeals have not achieved complete uniformity in deciding the questions raised in these petitions, the alleged conflicts are neither as pervasive nor as important

as petitioners suggest. Accordingly, we do not believe that the present cases warrant an exercise of this Court's certiorari jurisdiction. Should the issues prove to be recurring, they will presumably arise in cases that are less idiosyncratic—and thus more appropriate for further review—than those now before the Court.

1. The petition in No. 86-622 raises the question whether 38 U.S.C. 211(a) precludes judicial review in these circumstances. While there is some tension among the courts of appeals on this issue, the extent to which there is a square conflict of authority is not entirely clear. The courts have generally accepted the principle stated in Section 211(a) and repeated by this Court, that ["j]udicial review of VA [benefits] decisions is precluded by statute." *Walters* v. *National Association of Radiation Survivors*, 473 U.S. 305, 307 (1985). The courts have articulated only two limited exceptions to the statutory bar on judicial review: where a challenge is made to the constitutionality of a *statute* (*Johnson* v. *Robison*, 415 U.S. 361 (1974)), and where a challenge to a VA policy is made, not by a party seeking benefits, but by a third party affected by the policy who has no opportunity to be heard in administrative proceedings.[4]

In situations where neither of these limited exceptions obtains, the general rule has prevailed, precluding judicial review of benefits decisions at the behest of the veteran. *E.g.*, *Barefield* v. *Byrd*, 320 F.2d 455 (5th Cir. 1963); *Milliken* v. *Gleason*, 332 F.2d 122 (1st Cir. 1964), cert.

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[4] See, *e.g.*, *Evergreen State College* v. *Cleland*, 621 F.2d 1002 (9th Cir. 1980); *University of Maryland* v. *Cleland*, 621 F.2d 98 (4th Cir. 1980); *Merged Area X (Education)* v. *Cleland*, 604 F.2d 1075 (8th Cir. 1979); *Wayne State University* v. *Cleland*, 590 F.2d 627 (6th Cir. 1978). These cases were not brought by veterans seeking review of denials of benefit claims. Rather, they were brought by "educational institutions interested in the overall administration of the VA educational benefits program" (86-622 Pet. App. 18a).

denied, 379 U.S. 1002 (1965); *Redfield* v. *Driver*, 364 F.2d 812 (9th Cir. 1966); *Fritz* v. *Director of Veterans Administration*, 427 F.2d 154 (9th Cir. 1970); *Wickline* v. *Brooks*, 446 F.2d 1391 (4th Cir. 1971), cert. denied, 404 U.S. 1061 (1972); *Ross* v. *United States*, 462 F.2d 618 (9th Cir. 1972); *De Rodulfa* v. *United States*, 461 F.2d 1240 (D.C. Cir. 1972); *Holley* v. *United States*, 352 F. Supp. 175 (S.D. Ohio 1972), aff'd without opinion, 477 F.2d 600 (6th Cir. 1973); *Anderson* v. *VA*, 559 F.2d 935 (5th Cir. 1977); *Rosen* v. *Walters*, 719 F.2d 1422, 1424-1425 (9th Cir. 1983); *Pappanikoloaou* v. *Administrator of the Veterans Administration*, 762 F.2d 8, 9 (2d Cir. 1985).

Petitioner attempts to avoid the preclusive effects of the statute by contending that he is challenging the validity of a regulation rather than the benefits decision in a particular case. Aside from the fact that petitioner does indeed challenge his individual benefits determination, no court of appeals has recognized the new exception to Section 211(a) petitioner proposes. Indeed, the only other court of appeals that has ruled conclusively on petitioner's proffered justification for judicial review has, like the Second Circuit, expressly rejected it. *Roberts* v. *Walters*, 792 F.2d 1109 (Fed. Cir. 1986).[5] The District of Columbia Circuit in *McKelvey* voiced no disagreement with the Second Circuit's decision in *Traynor*. It reached a different result only "[b]ecause of the unusual, perhaps *sui generis*,

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[5] The cases petitioner alleges to be in conflict with the decision of the Second Circuit below are all distinguishable (see 86-622 Pet. 27 n.1). In *Tinch* v. *Walters*, 765 F.2d 599 (1985), the Sixth Circuit reached the merits of a veteran's contention that 38 C.F.R. 3.301(c)(2) violates the Rehabilitation Act, but the court did not address the question whether Section 211(a) precluded judicial review. It therefore cannot be predicted how the Sixth Circuit would rule if it were to face that issue. Compare *Holley* v. *United States*, *supra*, with *Wayne State University* v. *Cleland*, *supra*. The remaining cases upon which petitioner relies did not involve claims by veterans challenging denials of benefits (see note 4, *supra*).

posture" of the case before it, expressly disclaiming "a definitive decision on the breadth" of Section 211(a) and stating that "we do not anticipate another occasion to review a VA order on the basis that supports our review today" (86-737 Pet. App. 6a, 9a).

Even if there were a clear conflict among the courts of appeals, the present cases involve singular facts that would diminish the precedential value of any decision by this Court on the scope of Section 211(a).[6] Accordingly, further review is not warranted.

2. a. Both petitions raise the substantive question whether petitioners are entitled to extend their periods of eligibility for benefits under 38 U.S.C. 1662(a).[7] Although a conflict exists on this issue between the decision of the District of Columbia Circuit in *McKelvey* and the decision of the Sixth Circuit in *Tinch* v. *Walters*, 765 F.2d 599 (1985), the limited prospective impact of that conflict leads us to conclude that review is not warranted.[8]

Subsection (e) of Section 1662 provides that "[n]o educational assistance shall be afforded any eligible veteran under this chapter * * * after December 31, 1989." In view of the impending expiration of the program, we concur in petitioner McKelvey's prediction that cases under this program "may not arise in the future." 86-737

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[6] In neither case now before the Court did the VA address the merits of the statutory claim presented for judicial review. These cases are therefore cluttered with two threshold questions: whether the VA may consider such statutory claims and whether there was any "decision[] of the Administrator" on the merits of the issue on which judicial review is sought. Future cases should not be so burdened. The court of appeals in *McKelvey* instructed the VA "not [to] regard as outside the arsenal of law it applies any potentially relevant congressional enactment." 86-737 Pet. App. 9a.

[7] The Second Circuit of course did not reach this issue in light of its holding under Section 211(a).

[8] The government did not file a petition for a writ of certiorari in *Tinch*.

Pet. 12 n.8.[9] Even at present, the question raised here will affect only a few cases involving that program. The VA advises that in the past two years only 13 veterans have sought on account of alcoholism to extend the period within which they may receive educational benefits.[10] Moreover, since the educational benefits extension legislation has several unique features that will affect the analysis of the Rehabilitation Act issue, it is questionable whether a decision in these cases would be dispositive in cases arising under other programs of more general application.

b. Like every other qualified veteran—handicapped and non-handicapped, alcoholic and non-alcoholic—each petitioner had a ten-year period of eligibility for educational benefits.[11] Persons in petitioners' circumstances therefore had some meaningful access to the relevant benefit. Cf. *Alexander* v. *Choate*, 469 U.S. 287, 301-306 (1985) (Rehabilitation Act is not violated by state Medicaid rule that had disparate impact on the handicapped). There is no claim that any action, regulation or decision by the VA denied benefits to petitioners during the statutory delimiting period, much less that any such denial constituted discrimination violative of the Rehabilitation Act. Rather, these cases are confined to the contention

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[9] Because of the relatively small number of cases arising under 38 U.S.C. 1662(a) that would be affected by the issue in this case (see note 10, *infra*), the potential absence of nationwide uniformity should not impose substantial inconvenience in administering this program until its expiration in 1989.

[10] The VA informs us that since 1979 (two years following adoption of the extension legislation), the Board of Veterans Appeals has decided the following numbers of cases involving alcoholics seeking extensions of the ten-year post-discharge period for utilizing educational benefits under 38 U.S.C. 1662(a): 1979—20; 1980—26; 1981—14; 1982—13; 1983—16; 1984—15; 1985—3; 1986—10).

[11] Petitioner Traynor in fact received veterans' educational benefits during that period.

that petitioners are entitled to have their eligibility periods extended—a privilege that is not available to non-disabled veterans. As the District of Columbia Circuit recognized (86-737 Pet. App. 11a n.2), petitioners' claim differs from the issue that more commonly arises under the Rehabilitation Act, *viz.*, whether discrimination exists between handicapped individuals and others. Here, petitioners' claim is one of "discrimination between various categories of handicapped individuals." *Ibid.*; see *Colin K.* v. *Schmidt*, 715 F.2d 1, 9 (1st Cir. 1983).[12]

c. In Section 1662(a) Congress chose to extend the period of eligibility for federal benefits only to those disabled veterans whose disabilities were not caused by their own willful misconduct. In so doing, Congress drew on a long line of similar enactments and a consistent history of VA interpretation. For many years Congress has provided a "willful misconduct" exception to veterans' eligibility for service-connected disability compensation (see 38 U.S.C. 310; 86-622 Pet. App. 118a). In 1964, in a case arising under the disability compensation program, the VA explained in detail its interpretation of "willful misconduct" as applied to alcoholism, an interpretation that has roots in cases dating back to 1931. It was against this background that Congress in 1977 adopted the "willful misconduct" standard for educational benefits extensions (38 U.S.C. 1662(a)(1)). The Senate Veterans Affairs Committee stated that "[i]n determining whether the disability sustained was the result of the veterans' own 'willful misconduct,' the Committee intends that the same standards be applied as are utilized in determining eligibility for other VA programs under title 38." S. Rep. 95-468,

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[12] The facts of the present cases are even more rarefied. Since petitioners are now able to pursue educational programs, their Rehabilitation Act claim is that they are now being discriminated against solely on account of a past disability. There is no claim that they are the victims of present discrimination because of a present disability.

95th Cong., 1st Sess. 69-70 (1977). Indeed, the Senate Report expressly refers to the VA policy involved here (which has not been changed since 1977).[13]

In light of this plain statutory language and legislative history, the VA's continued adherence to the interpretation expressly approved in the Senate Report was surely faithful to congressional intent.[14]

d. Petitioners do not quarrel with *Congress's* authority to exclude from the scope of the benefits-extension legislation those whose disability is the product of "willful misconduct." Moreover, as the District of Columbia Circuit recognized (86-737 Pet. App. 10a), petitioners

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[13] The Senate Report cites VA Manual 21-1, § 14.04 (Jan. 29, 1976) (see C.A. App. 13 *et seq.*). Section 14.04c states that "[b]asic principles for application in deciding cases involving alcoholism are stated in Administrator's decision No. 988 * * *." Administrator's Decision No. 988 is the administrative policy decision involved in this case. See 86-622 Pet. App. 139a-147a.

[14] There is no merit to petitioners' contention that the 1977 legislation was superseded by Congress's action in 1978 extending the Rehabilitation Act to federal agencies. The 1978 amendment to the Rehabilitation Act made no reference to the veterans' benefits program. Repeals by implication are not favored, especially where the later statute is general and the earlier statute is specific. *Radzanower* v. *Touche, Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); *Silver* v. *NYSE*, 373 U.S. 341, 357 (1963).

At all events, the Rehabilitation Act does not require the VA to make the extension provision available to all veterans or even to all disabled veterans. Under regulations implementing the Rehabilitation Act promulgated by the Secretary of Health and Human Services, "the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited * * *" (45 C.F.R. 84.4(c); see also 28 C.F.R. 41.51(c)). This Court has stated that the Secretary's regulations constitute "an important source of guidance on the meaning of § 504." *Alexander* v. *Choate*, 469 U.S. at 304 n.24; *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 413 (1979).

"presumably * * * would not object to a VA regulation that stated nothing more than, 'those alcoholics whose alcoholism is attributable to their own willful misconduct are ineligible for educational benefits extensions.' " Since petitioners do not contend that alcoholism can never be willful misconduct under the statute, these cases are reduced either to the essentially factual question whether petitioners' alcoholism constituted willful misconduct, or to the narrow legal question whether the standard the VA has employed for decades, and that Congress has expressly approved, is a reasonable basis for determining when alcoholism is willful misconduct.

Given these circumstances, the present cases do not merit further review. Should the question whether the VA regulation violates the Rehabilitation Act arise in a context with broader programmatic significance—*e.g.*, disability benefits—the Court could decide at that time whether review is warranted.[15]

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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[15] A case involving disability benefits is presently pending in the Third Circuit. *Buck* v. *VA*, No. 86-1656.

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No. 86-737

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JAMES P. McKELVEY,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR
OF VETERANS' AFFAIRS, and
VETERANS' ADMINISTRATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

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TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER

The government concedes that a conflict exists between the decisions of the District of Columbia Circuit in this case and the Sixth Circuit in Tinch v. Walters, 765 F.2d 599 (6th Cir. 1985), concerning the question of whether the

VA's willful misconduct regulation discriminates against the handicapped in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). Respondent's Brief ("Res. Br.") at 13. This fact alone justifies consideration of this case.

The government argues, however, that the Court should decline to consider the issue presented here because, it contends, few cases arise in which alcoholics seek extensions of the delimiting date in which to use their VA educational benefits. Res. Br. at 14. However, the figures in the government's brief demonstrate that since 1979, 117 alcoholic veterans have sought extensions of the period in which to use their educational benefits. Res. Br. at 14 n.10. Clearly this case would have an impact far beyond the individual litigants involved.

Defendant also asserts that the "unique features" of the VA educational benefits extension legislation make this case unlikely to have significance in other contexts. Res. Br. at 14. Those features are not identified, and it is clear that this Court's guidance on whether a federal agency may write its regulations in such a way as to discriminate against a group of handicapped individuals would have broad applicability.

Respondents also argue that "petitioners do not contend that alcoholism can never be willful misconduct under the statute." Res. Br. at 17. It may be, though it is doubtful, that in a specific factual setting alcoholism could be shown to be willful misconduct. But the VA's regulation precludes consideration of any facts, by defining alcoholism in all cases as willful misconduct.

Hence, this case does not present the "factual question whether [Mr. McKelvey's] alcoholism constituted willful misconduct," Res. Br. at 17, because that question was never considered, either by the VA or the courts. Rather, the case squarely raises the broad legal issue of the authority of federal agencies to define alcoholics in such a way that they are denied the protections of the Rehabilitation Act.

Just yesterday this Court affirmed that "the basic purpose of § 504 . . . is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." School Board of Nassau County v. Arline, No. 85-1277 (March 3, 1987) (slip op. at 9.) The government now asks this Court to ignore the protections afforded

alcoholics by § 504 in order to give force to a regulation that has its "roots" in the era of Prohibition. Res. Br. at 15. The Court should reject this request.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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Nos. 86-622 and 86-737

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EUGENE TRAYNOR,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, and VETERANS' ADMINISTRATION,

Respondents.

JAMES P. MCKELVEY,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, and VETERANS' ADMINISTRATION,

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Board of Veterans Appeals Findings and Decision in the Appeal of Eugene Traynor, dated December 17, 1980 ..... 90a

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No. 86-737

Opinion of the United States Court of Appeals for the District of Columbia Circuit, dated May 30, 1987 ..... 1a

Opinion of the United States District Court for the District of Columbia, dated October 19, 1984 ..... 32a

Order of the United States District Court for the District of Columbia granting Plaintiff's Motion for Summary Judgment, dated October 19, 1984 ..... 47a

Judgment and Order of the United States Court of Appeals for the District of Columbia Circuit, dated May 30, 1986 ..... 48a

Order of the United States Court of Appeals for the District of Columbia Circuit denying Petition for Rehearing, dated August 7, 1986 ..... 49a

Order of the United States Court of Appeals for the District of Columbia Circuit denying Suggestion for Rehearing En Banc, dated August 7, 1986 ... 50a

Chronological List of
Relevant Docket Entries
No. 86-622

July 13, 1982	-	Complaint filed in the United States District Court for the Southern District of New York
October 18, 1982	-	Defendants' Answer filed
April 2, 1984	-	Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment filed
April 4, 1984	-	Plaintiff's Cross-Motion for Summary and Declaratory Judgment filed
April 4, 1985	-	District Court opinion filed granting Plaintiff's Motion for Summary and Declaratory Judgment
June 6, 1985	-	Judgment of District Court for plaintiff entered
August 1, 1985	-	Notice of Appeal filed

May 16, 1986	-	Judgment of United States Court of Appeals for the Second Circuit reversing the judgment of the District Court entered
July 15, 1986	-	Order denying Petition for Rehearing and Suggestion for Rehearing En Banc filed
October 14, 1986	-	Petition for Certiorari filed
March 9, 1987	-	Certiorari granted

Chronological List of
Relevant Docket Entries

No. 86-737

July 20, 1983	-	Complaint filed in the United States District Court for the District of Columbia
September 27, 1983	-	Defendant's motion to dismiss or, in the alternative, for summary judgment filed
October 26, 1983	-	Plaintiff's cross-motion for summary judgment and memorandum in support thereof filed
October 19, 1984	-	Memorandum Opinion and Order of District Court filed, granting plaintiff's motion for summary judgment in part and invali-

		dating 38 C.F.R. § 3.301(c)(2) as discriminatory in violation of § 504 of the Rehabilitation Act, 29 U.S.C. § 794, and remanding the case to the VA for determination of whether plaintiff is entitled to benefits
December 13, 1984	-	Notice of Appeal filed
May 30, 1986	-	Judgment of the United States Court of Appeals for the District of Columbia Circuit reversing the judgment of the District Court entered
August 7, 1986	-	Per curiam order denying appellee's petition for rehearing.

August 7, 1986	-	Per curiam order, en banc, denying appellee's suggestin for rehearing en banc.
Nov. 5, 1986	-	Petition for Certiorari filed
March 9, 1987	-	Certiorari granted

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EUGENE TRAYNOR,	:	
Plaintiff,	:	COMPLAINT
- against -	:	Civil Action No. 82 Civ.
ROBERT P. NIMMO, Administrator of the Veterans' Administration; and the VETERANS' ADMINISTRATION,	:	4563 (Cooper)
Defendants.	:	

PRELIMINARY STATEMENT

1. This action is brought on behalf of an honorably discharged veteran who has been denied the veterans' educational assistance benefits to which he is entitled solely on the basis of a history of alcoholism, a disease from which he is now recovered.

2. Plaintiff's honorable tour of active duty in the armed services entitled him to veterans' educational assistance

benefits; he was unable to use these benefits to pursue his education for several years following his discharge because he was suffering from alcoholism. Following his recovery, he requested an extension of time in which to use his entitlement to benefits pursuant to Veterans' Benefits Law §1662(a). Section 1662(a) requires that extensions of time be granted to any veteran who, because of a disability that was not the result of his own willful misconduct, was prevented form pursuing his education during the time that veterans are normally allotted for using educational assistance benefits. Defendants have denied plaintiff an extension of time solely on the basis of a Veterans' Administration regulation that conclusively defines alcoholism as resulting from "willful misconduct."

3. Plaintiff challenges the regulation defendants applied to deny him the

extension of time to use the education benefits to which he was entitled on the grounds that:

A. It discriminates against veterans who are entitled to educational assistance benefits solely on the basis of their handicap of alcoholism, in violation of section 504 of the Rehabilitation Act of 1973 as amended in 1978, 29 U.S.C. §794;

B. By refusing to recognize alcoholism as a disability and conclusively defining it as resulting from willful misconduct, thus denying veterans with a history of alcoholism the benefits to which they are entitled under 38 U.S.C. §1662(a), it discriminates against a particular class of persons without rational justification in violation of the Fifth Amendment to the Constitution of the United States;

C. It was promulgated and is applied by defendants in excess of their statutory authority, without rational basis, and without observance of the procedures required by law, in violation of 38 U.S.C. §§105, 210(c)(1) and 1662(a) and 5 U.S.C. §§553, 701-706.

JURISDICTION

3. This is a civil action brought under 29 U.S.C. §794, which provides that no otherwise qualified handicapped individual shall, by reason of his handicap, be denied the benefits of, or be subjected to discrimination under any program or activity conducted by any Executive Agency; and under the Fifth Amendment to the Constitution of the United States. This action is also brought under 38 U.S.C. §§210(c)(1),

1662(a) and 5 U.S.C. §§553, 701-706, in that it challenges defendants' regulation concerning alcoholism as being promulgated without observance of the procedures required by law, without rational basis and in excess of defendants' statutory authority to administer the Veterans' Benefits Law. The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1331, 28 U.S.C. §1361, 28 U.S.C. §§2201 and 2202, and 29 U.S.C. §794(a)(2).

PARTIES

4. Plaintiff Eugene Traynor is an honorably discharged veteran who resides in New York State.

5. Defendant Veterans' Administration (VA) is that part of the executive branch responsible for administering the laws relating to veterans' benefits. 38

U.S.C. §201. The VA regional office which denied plaintiff's application for benefits is located in New York City.

6. Defendant Robert P. Nimmo is the Administrator of the VA and is sued in his official capacity. As Administrator, he is in charge of the VA, and is responsible for executing the laws relating to veterans' benefits and for promulgating regulations which are consistent therewith. 38 U.S.C. §210.

STATEMENT OF THE FACTS

7. Plaintiff received an honorable discharge from the armed services after serving on active duty from February 27, 1968 through August 27, 1969.

8. By virtue of his honorable tour of active duty, plaintiff became entitled to veterans' educational assistance

benefits under Chapter 34 of the Veterans' Benefits Law, 38 U.S.C. §1651, et seq.

9. From some time prior to his discharge through February 1974, plaintiff suffered from the disease of chronic alcoholism. As a result he drank compulsively and was ill every day, suffered from frequent internal bleeding (resulting in hematemesis), convulsive seizures, loss of consciousness and other disabling symptoms of alcoholism. During this period plaintiff was unable to hold a job for more than a few days, and was hospitalized five times for treatment of the convulsions, hematemesis, and other deleterious signs of alcoholism. He was initially diagnosed as suffering from alcoholism in 1970, and this diagnosis was reconfirmed each time he was hospitalized through 1974.

10. In February 1974 plaintiff joined Alcoholics Anonymous, stopped

drinking, and began recovering from alcoholism. By January 1976 he was able to obtain full-time employment. He has been steadily employed on a full-time basis since that time.

11. During the time plaintiff was suffering and recovering from chronic alcoholism, he was unable to initiate or pursue his college education.

12. By 1978, plaintiff had sufficiently recovered from alcoholism to be able to pursue his education. In the spring of 1978 he was admitted to City College of the City University of New York, and began taking courses at night while he continued to work full-time.

13. When plaintiff began attending college, he applied for and was determined to be entitled to veterans' educational assistance benefits.

14. Plaintiff received veterans' educational assistance for the first four

semesters that he attended college (the 1978 spring, summer and fall terms, and 1979 spring term).

15. In 1979, the VA notified plaintiff that his educational assistance benefits would be terminated as of August 27, 1979, ten years after the date he was discharged from active duty (his "delimiting date").

16. The Veterans' Benefits Law, 38 U.S.C. §1662(a), provides in pertinent part:

> (a)(1) No education assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty...except that, in the case of any veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall, upon application...be granted an extension of the applicable

> delimiting period for such length of time as the Administrator determines, from the evidence, that such veteran was so prevented from initiating or completing such program of education.

17. The Veterans' Benefits Law defines "disability" for purposes of determining claims for veterans benefits as meaning "a disease, injury, or other physical or mental defect." 38 U.S.C. §601(1).

18. Alcoholism is a disability under the meaning of 38 U.S.C. §601(1) and 38 U.S.C. §1662(a).

19. Although the Veterans' Benefits Law nowhere defines what constitutes "willful misconduct," VA regulation §3.1(n) defines that term as follows:

> (n) "Willful misconduct" means an act involving conscious wrongdoing or known prohibited action (malum in se or malum prohibitum). A service department finding that injury, disease or death was not due to misconduct will be binding on the Veterans

> Administration unless it is patently inconsistent with the facts and the requirements of laws administered by the Veterans Administration.
>
> (1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.
>
> (2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.
>
> (3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death. (See §§3.301, 3.302.)

38 C.F.R. §3.1(n).

20. In May 1979 plaintiff applied for an extension of his delimiting date pursuant to 38 U.S.C. §1662(a) on the ground that his former condition of alcoholism was a disability that had prevented him from initiating or completing his education during his delimiting period. In support of this application, he submitted medical evidence that documented his history of alcoholism during the period for which he sought an

extension of time for receiving educational assistance benefits.

21. By letter dated August 21, 1979, the New York City Regional Office of the VA informed plaintiff that it had denied his application.

22. The sole basis for this decision was VA regulation §3.301(c)(2), which conclusively presumes alcoholism to be the result of "willful misconduct."

23. VA regulation §3.301(c)(2) provides that the general definition of "willful misconduct" set forth in ¶19, supra shall not apply in determining claims for certain veterans' benefits where alcoholism is concerned. Instead, it provides that the following rule shall govern such determinations:

> (2) Alcoholism. The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption

> to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

38 C.F.R. §3.301(c)(2).

24. Although plaintiff had been hospitalized several times during the period for which he sought an extension of his delimiting date for treatment of secondary organic disorders caused by his chronic alcoholism, as set forth in ¶9, supra, the VA refused to grant him any extension of time for even those periods of hospitalization because of another VA regulation, 38 C.F.R. §21.1043(a), which provides that a veteran disabled for periods of 30 days or less will not be

considered to have been prevented from pursuing his education given the short duration of his disability. In applying VA regulation 21.1043(a), defendants refused to recognize alcoholism itself as a disability.

25. The VA terminated plaintiff's educational assistance benefits as of August 27, 1979. At that time, plaintiff had approximately fourteen and one-half months of educational assistance benefits remaining in his original entitlement.

26. Plaintiff appealed the initial decision denying him an extension of his delimiting date to the VA's Board of Veterans' Appeals in Washington, D.C. At a hearing held on August 1, 1980 plaintiff submitted additional evidence to the Board of Veterans' Appeals showing that alcoholism is recognized as a chronic

disease by the American Medical Association, the American Psychiatric Association and federal agencies, including the VA itself in its hospitals and rehabilitation programs, that persons afflicted with the disease drink compulsively and without control, and that such drinking and the consequent disabling effects are not the result of willful conduct.

27. On December 17, 1980 the Board of Veterans' Appeals denied plaintiff's appeal on the basis of VA regulation §3.301(c)(2).

28. Plaintiff sought reconsideration of this decision. On November 17, 1981 the Board of Veterans' Appeals issued its opinion on reconsideration, affirming its previous decision on the basis of VA regulation §3.301(c)(2). In this opinion, the Board refused to consider plaintiff's claims that regulation §3.301(c)(2)

violated the Fifth Amendment, the Rehabilitation Act, and the Veterans' Benefits Law, on the ground that 38 U.S.C §4004(c) limited the Board's jurisdiction and bound the Board to act in accordance with VA regulations and Veterans' Administrator's Decisions.

29. Since September 1979 plaintiff has continued to attend college at his own expense.

30. Defendants are required by 38 U.S.C. §210(c)(1) and by 5 U.S.C. §§553 and 701-706 to adopt regulations which do not exceed their statutory authority, and which are rationally related to statutory objectives. They are also required by 5 U.S.C. §553 and 38 C.F.R. §1.12 to promulgate regulations pursuant to the procedures set forth in the Administrative Procedure Act, 5 U.S.C. §551 et seq. Defendants have failed to fulfill these obligations.

31. The VA originally defined alcoholism as willful misconduct for purposes of determining claims for certain benefits under the Veterans' Benefits Law during Prohibition when the sale of alcohol was illegal (Veterans' Regulation No. 10 and Veterans' Administrator's Decision No. 2); it subsequently incorporated that definition of alcoholism in Veterans' Administrator's Decision No. 988, which was issued in 1964.

32. On information and belief, the definition of alcoholism as willful misconduct contained in Veterans' Administrator's Decisions Nos. 2 and 988 provided the sole basis for VA regulation §3.301 (c)(2) when defendants promulgated that regulation in 1972. On information and belief, regulation §3.301(c)(2) was not based on any studies or medical evidence regarding the nature of alcoholism.

33. VA regulation §3.301(c)(2) was promulgated in 1972 pursuant to Chapters 11 and 15 of the Veterans' Benefits Law, 38 U.S.C. §§310 and 521, which pertain to benefits for service-connected disabilities (known as "compensation") and to benefits for non-service-connected disabilities (known as "pension"). These chapters provide benefits for a disability from which a veteran has not recovered, provided that the disability was not the result of the veteran's own willful misconduct.

34. VA regulation §3.301(c)(2) and the Veterans' Administrator's Decisions on which it is based were not promulgated pursuant to Chapter 34 of the Veterans' Benefits Law, 38 U.S.C. §1651 et seq., which pertains to educational assistance benefits. Defendants have nevertheless applied this regulation to applications for educational assistance benefits

without having published notice in the Federal Register and without having received comments or considered whether it is appropriate to use a definition developed for different benefit programs during Prohibition.

35. In 1970 the Congress of the United States recognized that: "Alcoholism is an illness requiring treatment...." 42 U.S.C. §4541(a)(8) (Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970).

36. The Congress has further provided that persons with a history of alcoholism are "handicapped" individuals entitled to the protections of the Rehabilitation Act of 1973 as amended in 1978, 29 U.S.C. §706(7).

37. Defendant VA is an agency within the executive branch of the federal government, 38 U.S.C. §201, and as such

is required to comply with section 504 of the Rehabilitation Act, 29 U.S.C. §794, which provides in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any program or activity...conducted by any Executive Agency....

38. By virtue of his history of alcoholism, plaintiff is a handicapped individual within the meaning of section 706(7) of the Rehabilitation Act. Having demonstrated that his disability of alcoholism prevented him from being able to pursue his education during his original delimiting period, he is entitled to an extension of his delimiting date pursuant to 38 U.S.C. §1662(a).

39. Section 504 of the Rehabilitation Act of 1973 as amended in 1978 also provides that the head of each Executive

Agency "shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation...Act of 1978." The VA has failed to review its existing regulations and promulgate regulations which carry out its obligations under the Rehabilitation Act as amended in 1978.

VIOLATIONS OF LAW

40. VA regulation §3.301(c)(2):

A. Discriminates against qualified veterans in a federal benefit program on the basis of their handicap of alcoholism in violation of section 504 of the Rehabilitation Act, and is maintained and enforced in violation of defendants' duty to promulgate regulations to carry out the purposes of the Rehabilitation Act of 1973 as amended in 1978;

B. Was promulgated and is maintained and applied by defendants in excess of their statutory authority, without rational basis, and without observance of the procedures required by law, in violation of 38 U.S.C. §§105, 210(c)(1), 1662(a), and 5 U.S.C. §§553, 701-706 and 38 C.F.R. §1.12;

C. Creates an irrebuttable presumption and discriminates against a class of persons with a history of alcoholism without rational basis in violation of the Fifth Amendment to the Constitution of the United States.

41. By applying VA regulation §3.301(c)(2) to deny plaintiff any extension of his delimiting date for receipt of educational assistance benefits, defendants have:

A. Discriminated against a qualified handicapped individual in

violation of section 504 of the Rehabilitation Act of 1973 as amended in 1978;

B. Denied plaintiff benefits to which he was entitled by virtue of having been a disabled individual, in violation of the Veterans' Benefits Law, 38 U.S.C. §§105 and 1662(a); and

C. Discriminated against a handicapped individual in violation of the Fifth Amendment to the Constitution of the United States.

PRAYER FOR RELIEF

WHEREFORE, plaintiff respectfully requests that the court:

A. Declare, pursuant to 28 U.S.C. §2201, that defendants' regulation 38 C.F.R. §3.301(c)(2) and the Veterans' Administrator's Decisions Nos. 2 and 988 on which it is based are in violation of

the Rehabilitation Act of 1973 as amended in 1978, the Veterans' Benefits Law, the Administrative Procedure Act, and the Fifth Amendment to the Constitution and are therefore null and void;

B. Grant plaintiff's application for an extension of his delimiting date or, in the alternative, remand this case to the VA with a direction that defendants reconsider plaintiff's application without regard to VA regulation §3.301(c)(2) and Veterans' Administrator's Decisions Nos. 2 and 988;

C. Issue a permanent injunction pursuant to 28 U.S.C. §§1361 and 2202, requiring defendants, their agents, employees and successors to refrain from using or promulgating any regulation or Veterans' Administrator's Decision which is inconsistent with section 504 of the Rehabilitation Act of 1973 as amended in 1978, the Veterans' Benefits Law, 38

U.S.C. §§105, 1662(a), and the Fifth Amendment to the Constitution of the United States;

D. Issue a permanent injunction, pursuant to 28 U.S.C. §§1361, 2202, and 29 U.S.C. §794(a)(2), requiring defendants to promulgate regulations as required by section 504 of the Rehabilitation Act of 1978 and to do so pursuant to the procedures required by the Administrative Procedure Act and 38 C.F.R. §1.12.;

E. Award plaintiff costs, including disbursements, and reasonable attorneys' fees; and

F. Grant such other and further relief as may be appropriate.

Dated: New York New York
July 13, 1982

Respectfully submitted,

/s/ Ellen V. Weissman
MARGARET K. BROOKS
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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EUGENE TRAYNOR,	:	
Plaintiff,	:	
- against -	:	Civil Action No.
HARRY N. WALTERS, Administrator of the Veterans Administration; and the VETERANS ADMINISTRATION,	:	82 Civ. 4583 (I.B.C.)
	:	AFFIDAVIT OF
Defendants.	:	ANNE GELLER, M.D.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ANNE GELLER, being duly sworn, deposes and says:

1. I am a physician, and am currently the Director of the Smithers Alcoholism Treatment and Training Center, a comprehensive alcoholism treatment and rehabilitation facility in St. Luke's/ Roosevelt Hospital Center, New York, New York. I am also a professor of Clinical

Social Medicine at Columbia College of Physicians and Surgeons, New York, New York.

2. My medical education and training, professional experience, and published works are described in detail in my resume, a copy of which is attached as Appendix A to this affidavit. I received a bachelor's degree in medicine and a master's degree in physiology from Oxford University (Oxford, England). I earned my medical degree in 1960 from University College Hospital (London, England). Between 1960 and 1966, I completed residencies in psychiatry and neurology at New York University, Bellevue Hospital (New York, New York). Between 1966 and 1973, I served as a post-graduate fellow and professor of pharmacology at Albert Einstein College of Medicine (New York, New York). During this time I performed psychopharmacological research

and teaching, specializing in the effects of alcohol on the brain. Between 1974 and 1977, I was employed as a consultant on alcoholism and drug addition, and then as Chief Medical Consultant for the Federal Bureau of Disability, a branch of the United States Social Security Administration; my duties there included reviewing SSI disability cases involving alcoholism and addiction. Since 1977 I have been employed by the Smithers Alcoholism Treatment and Training Center ("Smithers"), serving as Coordinator of Treatment until 1979, and as Director of the program since then. In all, I have worked for eighteen years, performing both research and clinical work, in the field of alcoholism.

3. My memberships in medical and other organizations concerned with alcoholism treatment and rehabilitation are described in my resume. Among other

activities, I currently serve as Chairperson of the New York Chapter of the American Medical Society on Alcoholism, and as Chairperson of the Impaired Physicians Committee of the New York State Medical Society. I am also a member of the respective alcoholism committees of the New York State Medical Society and New York Academy of Medicine.

4. During the seven years in which I have been Coordinator of Treatment and then Director of Smithers, I have been involved in and responsible for the clinical treatment of thousands of persons with alcoholism. Smithers receives from 1000 to 1500 patients a year; I personally see about half of the patients and am responsible for organizing the clinical treatment of all patients.

5. I have published a number of articles concerning alcoholism research and treatment. Among them have been

articles on the psychopharmacology of alcoholism (including articles about the effects of alcohol on behavior and about disturbances in the brain that occur as a consequence of alcoholic drinking); on alcohol and anxiety; and on various aspects of alcoholism treatment and rehabilitation.

6. During the course of my professional career I have read and become thoroughly familiar with the available literature and studies relating to alcoholism; and with the official policies of national and international medical and professional health organizations concerning alcoholism and its treatment. I have also worked with or otherwise become familiar with the work and professional opinions of many if not most medical professionals specializing in the field of alcoholism research or treatment.

7. It is and has for many years been the consensus of the medical profession that alcoholism is a disease.

8. The American Medical Association ("AMA") first described and recognized alcoholism as an illness that requires and is appropriate for medical treatment in 1956. In its 1967 Manual on Alcoholism, the AMA defined alcoholism as follows:

> Alcoholism is an illness characterized by preoccupation with alcohol and loss of control over its consumption such as to lead usually to intoxication if drinking is begun; by chronicity; by progression; and by tendency toward relapse. It is typically associated with physical disability and impaired emotional, occupational, and/or social adjustments as a direct consequence of persistent and excessive use.
>
> * * * *
>
> As the illness progresses, the alcoholic's preoccupation with alcohol leads

> him to organize and orient his life around drinking. . . . Consumption of very substantial amounts of alcohol, however, and frequent intoxication *per se* are *not necessarily equated* with alcoholism, even though these signs usually are prominent in the course of the illness. It *can* happen that some alcoholics actually consume less liquor over a given length of time than do some social drinkers, but this fact in itself does not alter the basic condition nor make it less serious. *The key factor is in control*.

American Medical Association, *Manual on Alcoholism* (Chicago, 1957) at 6. [Emphasis supplied.]

9. The American Psychiatric Association ("APA") has also recognized alcoholism as a diagnosable and treatable illness for many years. It has classified alcoholism as a distinct mental disorder in every edition of its *Diagnostic and Statistical Manual of Mental*

Disorders ("DSM") since that comprehensive manual classifying, defining and setting forth criteria for diagnosing such disorders was first published by the APA in 1952. The APA's diagnostic criteria for alcoholism, as set forth in the current edition of this manual (DSM-III, published in 1980), are reproduced in Appendix B of this affidavit. These diagnostic criteria, with which I am in general agreement, are commonly accepted and widely used by the medical profession in diagnosing alcoholism.

10. The World Health Organization (WHO) has also officially recognized alcoholism as a distinct disease since 1951. This is reflected in its current edition of the International Classification of Diseases, Ninth Edition (ICD-9) (WHO, 1977) (No. 303, alcohol dependence syndrome).

11. The etiology (cause or causes) of alcoholism is not yet fully known. However, it is clear that the act of drinking does not itself make an individual alcoholic; of all people who drink, only 8 to 10 percent become alcoholic. Why those persons develop the disease, and what the etiology of alcoholism is, has been the subject of a great deal of research during the past twenty years. This research has shown that there are certain factors that predispose certain individuals to developing alcoholism, that make them vulnerable to developing this disease.

12. Out of that research has emerged strong evidence (consistent with my own work and clinical experience) that there is an extremely important genetic component to alcoholism. That is, there is an inheritable and inherited predisposition to developing alcoholism. Among

other studies documenting the genetic basis of this disease are recent studies of adopted children and twins in Scandinavia, whose purpose was in part to isolate environmental from genetic factors relating to alcoholism. The adoptee studies concerned children of alcoholic families who were adopted away from their biological parents at birth. They showed that, while the incidence of alcoholism among the general population of males in Scandinavia is approximately 7%, the incidence of the disease among adoptees with one alcoholic biological parent rose to 25%; and, if both biological parents were alcoholic, then the incidence of alcoholism in their adopted-away offspring rose to 50%.

13. There is a great deal of research now being done on children of alcoholics to determine precisely what it is in their genetic inheritance that

predisposes them to developing alcoholism. Although the answer is not yet clear, there is evidence that there are physical abnormalities in the way they metabolize alcohol. There also appear to be differences in the responses of children of alcoholics to alcohol, both physiological and psychological; these are still being investigated. This data suggests that the inherited predisposition of at-risk children of alcoholics is biochemical in nature.

14. Environmental and sociocultural factors also play a role in the development of alcoholism, just as they do in other diseases that are believed to have multiple causes, such as diabetes, schizophrenia and hypertension. Persons who live in social groups or societies where drinking is accepted, where drinking practices feature heavy, regular drinking or drinking-to-drunkenness,

become more vulnerable to developing alcoholism than those who live in societies where moderate or no drinking is the norm. For example, there is a lot of drinking and relief drinking in the Armed Services; such an environment will encourage the development of alcoholism in those predisposed to it.

15. Though the causes of alcoholism are not yet fully understood, the nature and course of the illness are well known. Alcoholism is a complex and progressive illness of insidious onset which typically develops over the course of many years. No one chooses to become an alcoholic; nor does anyone make a conscious decision to begin drinking alcoholically. Persons who do become alcoholic may begin drinking for the same reasons as those who are, and are able to remain, social drinkers: because alcohol is available and drinking socially

acceptable and enjoyable. However, individuals who develop alcoholism become increasingly dependent, psychologically and often physically, upon alcohol. As the disease progresses, alcohol becomes more and more essential for the alcoholic to function adequately. It becomes so central and important a part of life that the alcoholic cannot conceive of doing anything without a drink. The alcoholic drinker does not drink for enjoyment, but to medicate himself: to alleviate anxiety and tension (for alcohol is a sedative) and, where physical dependency upon alcohol develops (as discussed below), to forfend the pain of withdrawal.

16. The alcoholic's increasing dependency upon the drug is not something over which he has conscious control. Indeed, as the individual becomes progressively more dependent upon alcohol, the phenomenon of denial sets in. Denial is

an unconscious mental mechanism (unlike lying) by which an individual protects himself from recognizing his increasing need for alcohol and from being aware of the often-devastating consequences of its use. Denial is a primitive defense mechanism that all people have and may regress to in order to safegaurd themselves against the recognition of something which is threatening to their well-being. It is the ostrich syndrome: I don't see it; therefore it is not there. Denial is a common phenomenon in childhood; it is also a defense mechanism that adults often regress to when faced with catastrophe, illness or other life-threatening circumstances. Denial is a universal characteristic of alcoholism, and is inevitably present in the alcoholic. Indeed, as the illness progresses and the alcoholic's dependency upon alcohol increases, the denial itself

also progresses. The greater his need for alcohol, the greater becomes the alcoholic's denial of that need and the consequences of his drinking. Denial thus permits the alcoholic to persist in drinking, to satisfy his compelling need for alcohol, even in the face of the most extremely adverse consequences to his health and social and occupational functioning. It is this combination of gradually increasing dependency and denial that makes alcoholism so insidious an illness: the alcoholic simply does not and cannot let himself recognize what is happening to him. (And this defines a major purpose and focus of alcoholism treatment and rehabilitation: to break down the unconscious defense mechanism of denial, so as to enable the alcoholic to admit, and then learn to deal with, his dependency.)

17. Many (though not all) alcoholic drinkers develop physiological as well as psychological dependency upon the drug alcohol; this is characterized by tolerance (the need for ever greater amounts of alcohol in order to achieve the sought-for-effect) and withdrawal upon discontinuance of the drug (whose symptoms include anxiety, nausea, irritability, and possibly delirium tremors and seizures). There is a particular mechanism in the brain that responds to certain kinds of substances, of which alcohol is one, whereby the brain becomes adapted to the presence of the drug. As a consequence of this, the individual, in order to have the same effect from the drug, needs to have more and more of it. As this tolerance increases the addiction of the brain increases. When the use of alcohol is abruptly discontinued, one is left with a brain that is adapted to

alcohol, with nothing there for it to adapt to. The result is withdrawal, which is not only physically (as well as psychologically) painful but can be life-threatening. Thus, in persons who develop physiological dependence upon alcohol -- and those with daily drinking patterns will inevitably become physically dependent over time -- the use of alcohol becomes a matter of pure physical necessity: a certain level of alcohol must be maintained in the system in order to stave off withdrawal.

18. The salient characteristic of the alcoholic drinker is his loss of control over his drinking behavior. In contrast to the social drinker, once alcohol is in his system, the alcoholic's ability not to pick up another drink is lost; it is not something over which he has conscious or voluntary control. Thus alcoholics may, and many do, resolutely

and repeatedly promise themselves not to drink, to have only one drink, to stop drinking -- but repeatedly fail to do so. They cannot control their drinking not because they are irresolute or morally weak, but because they are alcoholic. This inability to alter or modify one's drinking pattern or to control intake once begun is a unique feature of alcoholic drinking, and not a part of social drinking at all.

19. In the majority of cases, alcoholism is a primary condition. That is, it is not the secondary result or manifestation of some other preexisting or underlying psychiatric disorder. However, many alcoholics present systems of depression and anxiety; these are common biochemically-induced psychiatric consequences of alcoholism, occurring as the result of alcohol's effect on neurotransmitters in the brain. (Thus,

detoxification and abstinence from alcohol will often be accompanied by the gradual decrease or disappearance of depression and anxiety in recovering alcoholics.) In some individuals, though, alcoholism is antedated by or associated with other distinct psychiatric disorder(s); and a dual diagnosis of alcoholism and other disorder(s) is appropriate.

20. In my seven years of clinical work at Smithers, in the preceding four years when I served as a consultant for the Social Security Administration reviewing SSI disability cases involving alcoholism, and as a result of my other professional experience in this field, I have had the opportunity to review the medical records and cases of thousands of persons diagnosed as having alcoholism. That experience confirms that the kind of diagnosis that is made

in the case of a particular individual -- whether the sole diagnosis is alcoholism, or whether a second diagnosis of a separate psychiatric disorder is also made -- is to a considerable degree fortuitous. That is, the nature of the diagnosis is likely to depend upon the nature of the facility where the individual is treated and the diagnosis is made, and upon the orientation -- medical or psychiatric -- of that particular facility. For example, alcohol detoxification units of hospitals or other medical facilities are likely to treat alcoholism as solely a medical condition, and persons treated in such facilities are apt to be given a diagnosis of primary alcoholism only. (Elmhurst Hospital, where I understand Eugene Traynor was treated, is one such facility.) Psychiatric facilities are more likely to consider and therefore to make second

diagnoses of psychiatric disorders in addition to alcoholism. In addition, because biochemically-induced depression and anxiety so often accompany alcoholism, the business of making accurate differential diagnosis becomes all the more difficult. This is not to say that accurate differential diagnoses cannot be or are never made in cases of alcoholism; but it is to say that chance does play a role in the diagnostic process in many individual alcoholics' cases.

21. In sum, alcoholism is a complex, chronic illness with both physiological and psychological components whose hallmarks are dependency, denial and the loss of control over one's drinking patterns and use of alcohol. It is, however, also an illness from which recovery is possible, as the many recovering and recovered alcoholics who have learned to accept and deal with their

illness, and been restored to health and normal functioning, can confirm.

22. I have personal knowledge of the facts stated herein.

/S/
ANNE GELLER, M.D.

Sworn to before me this
25 day of March, 1984.

/S/
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EUGENE TRAYNOR, Plaintiff, - against - HARRY N. WALTERS, Administrator of the Veterans Administration; and the VETERANS Administration, Defendants.	CA No. 82 4563 (I.B.C.) AFFIDAVIT OF SHELDON ZIMBERG, M.D.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

SHELDON ZIMBERG, being duly sworn, deposes and says:

1. I am a physician, and am currently the Director of Psychiatry at the Joint Diseases, North General Hospital (New York, New York). I am also an Associate Professor of Psychiatry at

Mount Sinai School of Medicine (New York, New York).

2. My medical education and training, professional experience, and published works are described in detail in my curriculum vitae, a copy of which is attached as Appendix A to this affidavit. I received a bachelor's degree from Brooklyn College (Brooklyn, New York) in 1957, and earned my medical degree from the State University of New York, Downstate Medical Center in 1961. From 1961 to 1962 I served as a medical intern at the Jewish Hospital of Brooklyn (Brooklyn, New York) and from 1962 to 1965 I completed a residency in psychiatry at Columbia Presbyterian Medical Center (New York, New York) and the New York State Psychiatric Institute (New York, New York). Between 1963 and 1966 I held a fellowship in community psychiatry at the Columbia University School of

Public Health and Administrative Medicine, and in 1966 I receive a masters degree in Community Psychiatry from that school.

3. Since 1965 I have been engaged in the private practice of psychiatry. In addition, from 1966 to 1970 I was an Instructor in Psychiatry at Columbia University, College of Physicians and Surgeons (New York, New York). From 1966 to 1969 I was chief of the Division of Community Psychiatry at Harlem Hospital (New York, New York). From 1967 to 1970 I was director of the Harlem Hospital Center Alcoholism Unit. Between 1970 and 1973 I was an Associate in Psychiatry at the Columbia University College of Physicians and Surgeons. From 1969 to 1973 I was Deputy Director of the Rockland County Community Mental Health Center (Pomona, New York). I was the Project Director of the Alcoholism

Treatment Center at the Joint Diseases, North General Hospital from 1973 to 1977. I was an Assistant Clinical Professor of Psychiatry at Columbia University College of Physicians and Surgeons from 1973 to 1974, and an Assistant Clinical Professor of Psychiatry at Mount Sinai School of Medicine from 1974 to 1977. I was Acting Director of the Department of Psychiatry at the Joint Diseases, North General Hospital from 1975 to 1977, and have been Director since 1977. Since 1977 I have also been an Associate Professor of Psychiatry at the Mount Sinai School of Medicine.

4. My memberships in medical and other organizations concerned with alcoholism treatment and rehabilitation are described in my curriculum vitae. Among other activities, I have served as Chairman of the Committee on Alcoholism and Drug Abuse of the New York County

District Branch of the American Psychiatric Association, Chairman of the Committee on Treatment of Alcoholism of the New York State Alcoholism Planning Task Force, and Chairman of the Committee on Inpatient Alcoholism Detoxification Criteria of the New York County Health Services Review Organization.

5. During the 19 years in which I have been practicing psychiatry, I have been involved in and responsible for the clinical treatment of hundreds of alcoholics. In addition, I have supervised the treatment of thousands of others. This clinical experience has been obtained in private psychiatric practice, in an urban general hospital center alcoholism treatment program, and in a suburban community mental health center alcoholism treatment program.

6. I have published a number of articles on the causes of and treatment for alcoholism. My publications and

presentations are listed in the attached curriculum vitae. I have also written a book, entitled The Clinical Management of Alcoholism (New York: Brunner/Mazel, 1982), which discusses these issues.

7. During the course of my professional career I have read and become thoroughly familiar with the available literature and studies relating to alcoholism; and with the official policies of national and international medical and professional health organizations concerning alcoholism and its treatment. I have also worked with or otherwise become familiar with the work and professional opinions of many if not most medical professionals specializing in the field of alcoholism research and treatment.

8. It is and has for many years been the consensus of the medical profession that alcoholism is a disease. This fact was recognized by the American

Medical Association in 1956. The World Health Organization has also, since 1951, officially recognized alcoholism as a distinct disease.

9. The American Psychiatric Association has also recognized alcoholism as a diagnosable and treatable illness for many years. It has classified alcoholism as a distinct mental disorder in every edition of its Diagnostic and Statistical Manual of Mental Disorders ("DSM") since that comprehensive manual classifying, defining and setting forth criteria for diagnosing such disorders was first published by the APA in 1952. I served on the advisory committee for Substance Abuse Disorders which helped prepare the definition of and diagnostic criteria for alcoholism, which appear in the current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders

(DSM-III, published in 1980). These diagnostic criteria are commonly accepted and widely used by the medical profession in diagnosing alcoholism.

10. There are about nine to ten million alcoholics in the United States. However, it is clear that the simple act of drinking -- even to excess -- does not itself make an individual an alcoholic. Of all people who drink, only about five percent become alcoholic. There has been a great deal of research directed toward determining the cause or causes of alcoholism. This research has turned up evidence that individuals with a family history of alcoholism, including parents, siblings, grandparents, uncles and aunts, are at greater risk of developing the disease. A number of studies have shown this correlation to be due, at least in large part, to a genetic predisposition to alcoholism. In 1970, G. Winokur and

associates performed a family study in St. Louis on 259 hospitalized alcoholics from both a state and a private hospital. They interviewed first-degree relatives (parents, children, siblings) of the alcoholic individuals and found that about 50 percent of the male first-degree relatives were alcoholic. (Winokur, G., Reich, T. Rimmer, J. et al., "Alcoholism: Its Diagnosis and Familiar Psychiatric Illness," in 259 Alcoholic Probands. Arch. Gen. Psychiat., 1970, 23:104 - 111.) M.S. Schuckit developed a half-sibling study, which allowed comparisons of children of alcoholic parents raised in foster homes with non-alcoholic parent figures and children without a biologic alcoholic parent raised in foster homes with an alcoholic parent figure. For every comparison of the relative influence of having a biologic parent as opposed to having lived with an adoptive

alcoholic parent figure, the biologic influence predominated in relation to the development of alcoholism. (Schuckit, R.J., Goodwin, D.W. and Winokur, G. "A Half Sibling Study of Alcoholism," Amer. J. Psychiat. 1972, 128:1132 - 1136.) A more recent study by R.J. Cadoret and associates confirmed these findings. (Cadoret, R.J., Cain, C.A. and Grove, W., "Development of Alcoholism in Adoptees Raised Apart from Alcoholic Biologic Parents," Arch. Gen. Psychiat. 1980, 37:561 - 563.)

11. A second factor which contributes to the development of alcoholism is the patient's environment and cultural background. It is well established that certain ethnic groups have very low rates of alcoholism and other groups have very high rates independent of the availability of alcohol. Alcohol use differs in function within

and between societies, cultures, subcultures, ethnic, and religious groups. Attitudes concerning the use of alcohol in a society fall within several general types, and help to determine general rates of alcoholism. For example, some societies encourage total abstinence from alcohol, by virtue of religious principles or traditions where drinking alcohol is regarded as a most serious antisocial act without justification, and/or immoral and sinful. Exceptions to these prohibitions are not tolerated and infractions are strongly condemned. There is very little distinction made between the social drinker and the alcoholic since all drinking is condemned. In these societies, alcoholism is relatively rare. In other societies, the use of alcohol is accepted, but only within specific settings, rituals or ceremonial rites.

The incidence of alcoholism varies in these societies according to the degree of controls for strict use and against excesses. Finally, where the use of alcohol, including drinking leading to intoxication, is accepted, as it is within many cultures in the United States, the prevalence of alcoholism is high.

12. My own work and clinical experience has lead me to develop a psychodynamic model of the primary alcoholic (the distinction between primary and secondary alcoholism will be discussed below). I do not believe it is appropriate to look for or to characterize an "alcoholic personality." However, my work in the field has taught me that many alcoholics have suffered from childhood rejection, overprotection, or premature responsibility, which leads to

an unconscious need for nurturance which cannot be met in reality and results in rejection. This rejection leads to anxiety, which in turn leads to the development of a number of defense mechanisms, particularly denial, and a compensatory grandiosity. The grandiosity causes such individuals to try harder and results in inevitable failure. Failures lead to more anxiety, depression, anger and guilt. These unpleasant effects can be reduced by alcohol, at least for a time, and lead to pharmacologically induced feelings of power and omnipotence, thus reinforcing the denial and reactive grandiosity. An individual with such a psychological conflict will become an alcoholic if there is a genetic predisposition to alcoholism (see paragraph 10 above), and if he lives in a society in which the use of alcohol is socially accepted or in which there is

considerable ambivalence regarding the use of alcohol (see paragraph 11 above).

13. As the above discussion indicates, alcoholism is a complex and progressive illness which gradually develops over the course of many years. No one makes a conscious choice to become an alcoholic. Many individuals with a genetic or cultural predisposition toward alcoholism never develop the illness because they do not suffer from the necessary psychological conflict. Others who exhibit the typical psychological traits never develop alcohol abuse problems because of the absence of the genetic component. Persons who do become alcoholic may begin drinking for the same reasons as those who are able to remain social drinkers. The disease is the result of the confluence of a number of predisposing factors. In the final analysis, however, none of these factors -- be they genetic, environmental or

psychodynamic -- are within the conscious control of the individual.

14. Historically, alcoholism has been viewed as a moral weakness by the lay public, and it is clear that there is a behavioral component to the disease. However, the course of a number of diseases, including diabetes, hypertension and lung cancer as well as alcoholism, is influenced by the behavior of the patient. Just as the progress of diabetes is influenced by the diabetic's eating patterns, the progress of alcoholism is influenced by the alcoholic's drinking patterns. Similarly, respiratory illnesses and hypertension are commonly linked to cigarette smoking.

15. In fact, the act of drinking alcohol may be less within the conscious control of the patient than many other debilitating behaviors precisely because the phenomenon of denial

is an integral a part of the disease of alcoholism. A number of researchers have noted that the predominant defense mechanism in the alcoholic is denial. Denial involves the avoidance of awareness of the harmful consequences of drinking. The central problem in the rehabilitation of an alcoholic is breaking through the massive though unconscious denial which is inevitably present. The typical response of an alcoholic is, "I can stop drinking any time I want to." In fact, the patient would not be alcoholic if he had the ability to exert conscious control over his behavior. One of the primary goals of alcoholism treatment, therefore, is to help the alcoholic understand that he is not in reality choosing to drink at all. Once this absence of volition has been brought to the attention of the patient, he has taken a giant step toward overcoming the disease.

16. Chronic use of alcohol produces tolerance to its central nervous system effects, and requires more and more alcohol to produce the mood and behavioral changes sought by the alcoholic. If alcohol is used long enough, an addiction is produced that can result in serious withdrawal reactions that can be life-threatening. The central nervious system mechanics of tolerance and addiction are not fully understood at the present time, but alcohol has profound effects on neuro-transmitters, particularly in producing a rapid turnover of central nervous system norepinephrine. As a result, the alcoholic must gradually increase the amount of alcohol he ingests in order to produce a constant effect. As tolerance increases, so does the physiological addiction. If the alcoholic is unable to maintain the level of alcohol intake his body needs, he will

experience a painful and possibly dangerous withdrawal. In essence, the physiologically dependent alcoholic uses the drug alcohol out of pure physical necessity. Here again, as the physiological need for alcohol increases so does the alcoholic's denial. Each feeds on the other, and they combine to produce a pattern of drinking which the patient can neither control nor understand.

17. A distinction is and can be made between primary and secondary alcoholism. The primary alcoholic has alcoholism as the major disorder with a significant coexisting psychiatric disorder or a psychiatric disorder developed after the onset of the alcoholism. (The psychological conflicts which I have described earlier as typical in primary alcoholics do not rise to the level of psychiatric disorders.) The secondary alcoholic develops alcoholism after the

onset of a major psychiatric disorder such as a severe depression. The psychiatric disorder can be viewed as being a major causal factor in the development of secondary alcoholism. This distinction is an important one to be aware of in planning the treatment of an alcoholic patient. If a patient presents evidence of alcoholism along with signs and symptoms of another psychiatric disorder, it is necessary to determine if the onset of the alcohol problem preceded or followed the development of the psychiatric disorder. The only way to be reasonably certain that a particular individual's alcoholism is either primary or secondary to another psychiatric disorder is to observe the patient alcohol-free for three to four weeks. If the psychiatric signs and symptoms persist in an alcohol-free state, one can assume the presence of a primary psychiatric disorder.

18. In my years of clinical experience treating and supervising the treatment of thousands of alcoholics, and in the course of my research on the treatment and diagnosis of alcoholism, I have found that many patients have been incorrectly diagnosed. In fact, it has been my experience that the diagnosis which is made in the case of a particular patient -- whether it be primary alcoholism or alcoholism secondary to a primary psychiatric disorder -- is often a function of the nature of the treatment facility itself, and has little to do with the patient's clinical and social history. Thus, patients who are diagnosed in a psychiatric facility are more like to be described as secondary alcoholics, while patients treated in detoxification units of general hospitals are usually given a diagnosis of primary alcoholism. I believe that an accurate

differential diagnosis can be made in alcoholism cases. In order to accomplish this, however, a patient must remain in treatment for three to four weeks. Because many patients who are clearly alcoholic are detoxified and released after a much shorter period of hospitalization, an accurate differential diagnosis as to the type of alcoholism from which they suffer is not possible.

19. I have been informed by counsel for Mr. Traynor that it is the policy of the Veterans Administration to deny an extension of delimiting date for receiving education benefits to a veteran whose sole disability is primary alcoholism. I understand that this policy is due to Veterans Administration regulations which presume primary alcoholism to be (an/or to be the result of) "willful misconduct (as that term is defined in Veterans Administration §§ 3.1(n) and

3.301(c)(2), which I have read.) It is my professional judgment that this characterzation of the illness and the attendant policy is in conflict with the weight of available medical evidence, and shows a clear misunderstanding of the nature and causes of alcoholism. I know of no competent expert in the field of alcoholism who would agree with the Veterans Administration's description of alcoholism as resulting from willful misconduct.

20. I have also read Administrator's Decision, Veterans Administration No. 988 (August 13, 1964), which provides in part:

> . . . With common social acceptance of the use of alcohol as a beverage, onset of the secondary condition may be very insidious in its development. Under such circumstances the development of the secondary condition does not meet the definition of intentional

> wrong-doing with knowledge or wanton disregard of its probable consequences. Secondary results are not the usual and probable effects of drinking alcohol as a beverage. By the time there is sufficient awareness of any probable deleterious consequences, the process has developed to a point where it is irreversible without professional help. At such time, the person by himself, may lack the capacity to avoid the continued use of alcohol. While it is proper to hold a person responsible for the direct and immediate results of indulgence in alcohol, it cannot be reasonably said that he expects and wills the disease and disabilities which sometimes appear as secondary effects.

It is my professional judgment that this description of the development of secondary conditions resulting from a primary alcoholism applies with equal force to the development of primary alcoholism as well. In fact, the above quoted language from Administrator's Decisin 988 is a

more accurate description of the development of primary alcoholism that it is of the secondary organic conditions which may result, since it is the underlying alcoholism and not the secondary condition which is the disease.

21. I have reviewed the records from Mr. Traynor's five hospitalizations which occurred during the period between 1970 and 1974. On the basis of the information contained in those records (see Exhibit B.2), it is my professional opinion that Mr. Traynor suffered from alcoholism and was physically addicted to the use of alcohol.

22. I have personal knowledge of the facts stated herein.

/s/
SHELDON ZIMBERG, M.D.
127a East 71st Street
New York, New York 10021

Sworn to before me this
29th day of March, 1986

/s/
Notary Public

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 16th day of May, one thousand nine hundred and eighty-six.

Present: HON. WILLIAM H. TIMBERS

HON. AMALYA L. KEARSE

HON. GEORGE C. PRATT,

Circuit Judges,

EUGENE TRAYNOR, Plaintiff-Appellee, v. HARRY W. WALTERS, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, Defendants-Appellants.	No. 85-6208

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against appellee.

Elaine B. Goldsmith
Clerk

/s/
By: Edward J. Guardaro
Deputy Clerk

EXCERPT FROM
TRANSCRIPT OF JULY, 1980 PROCEEDINGS
BEFORE THE BOARD OF VETERANS APPEAL
JAMES P. McKELVEY

* * * *

[Page 16]

Mr. Chairman:

Thank you Mr. Larama. Mr. McKelvey before I turn the questioning over to Dr. Weinstein I want to make one thing clear so that we can channel your testimony throughout the remainder of the Hearing along lines that would be important in our consideration whether or not there is a basis to allow this appeal and that is, I am aware of the medical disagreement about what kind of an animal alcoholism is. As far as we are concerned at the Board of Veterans Appeals, we don't have discretion to say that primary alcoholism is a disease. It is

defined in regulations as willful misconduct and whether we want to call it a disease or not, we have no authority to do that, we're bound by those regulations, so what we're after as Mr. Larama may have indicated to you, is some evidence that the alcoholism may have been secondary to a psychiatric

[Page 17]

or organic condition of some kind rather than existing on a primary basis or alternatively, that there were other conditions either psychiatric or organic which in themselves would have precluded you from pursuing a course of education during the relevant period. So having made these remarks I will now turn the questions over to Dr. Weinstein.

* * * *

IN THE APPEAL OF
JAMES P. MCKELVEY C 28 871 132

BOARD OF VETERANS APPEALS
Washington, D.C. 20420

FINDINGS AND DECISION) Docket No.
) 79-04 991
)
) Date
August 6, 1980

THE ISSUE

Entitlement to an extension of the veteran's delimiting date for educational assistance benefits.

REPRESENTATION

Appellant represented by: The American Legion

WITNESS AT HEARING ON APPEAL

James P. McKelvey, appellant

CONSULTATIONS BY THE BOARD

Francis F. Talbot, Staff Legal Adviser

ACTIONS LEADING TO PRESENT APPELLATE STATUS

This case was before the Board in June 1979, at which time it was remanded for additional development. The requested development has been attempted and the case has been returned to the Board for further appellate review.

CONTENTIONS

The veteran and his representative contend, in essence, that it is unclear whether the veteran's drinking problem or emotional problem began first; that he was treated in service at a mental hygiene clinic; that conditions beyond his control prevented him from completing his program of education before his delimiting date; that, while he was treated for alcoholism, treatment was also extended for conditions secondary to his alcoholism; that the veteran suffered

from fear, anxiety and depression; and that he has not had a drink since May 10, 1975.

THE EVIDENCE

The veteran served on active duty from September 1963 to September 9, 1966. On report of medical history completed by the veteran in conjunction with his entrance examination, he stated he had or had had nervous trouble. Service medical records reflect that on January 7, 1964, he was seen because of problems sleeping at night. He was reassured and referred to the mental hygiene clinic. On January 8, 1964, he was seen by the mental hygiene clinic for a followup. On report of medical history completed by the veteran in conjunction with his separation examination, he did not note any psychiatric problems. The veteran received

Chapter 34 benefits for training conducted from January 1973 to May 1973. The veteran's application for extension of his delimiting date was received by the Veterans Administration in November 1977. In January 1978, the Veterans Administration received a statement dated in October 1977 from D.B.V., M.D. The doctor stated that the veteran had been treated for a depressive reaction precipitated by injury to his left medial meniscus which occurred in October 1976. The Veterans Administration was notified in February 1978 that the veteran was a patient at the Washington Adventist Hospital from March 23 to 24, 1971, with a diagnosis of acute and chronic alcoholism; on August 23, 1971, with a diagnosis of acute alcoholism; from September 5 to 7, 1971, with a diagnosis of acute and chronic alcoholism; from November 24 to 26, 1972, with a

diagnosis of acute and chronic alcoholism; from January 23 to 24, 1973, with a diagnosis of acute and chronic alcoholism; and from February 27, 1977, through March 3, 1977, with a diagnosis of torn medial meniscus, left knee arthrotomy, meniscectomy.

J.R.C. reported in a statement in January 1978 that the veteran had been known to the Montgomery County Health Department Alcohol Program since March 1971 and that at that time he was transferred to their detoxification center, and then to a hospital center. It was also reported that from March 1971 until May 1975, the veteran was in and out of their program and many other programs as a practicing chronic alcoholic plus all the other mental and physical problems related to continuous alcohol abuse.

In a statement dated in March 1978, it was reported that the veteran was admitted to the Maplewood Quarterway House for alcoholism from April 1, 1973, through April 13, 1973; August 26, 1973, through August 28, 1973; and on May 8, 1975. In April 1978, the Veterans Administration was notified that the veteran was a patient at Montgomery General Hospital from February 9, to February 12, 1974, and from October 12 to October 19, 1974, and that his diagnosis for both admissions was alcoholism.

In August 1978, the Administration received a statement prepared for the signatures of K.B. and Dr. V. The statement was dated in August 1977. It was reported that the veteran was currently experiencing a depressive reaction precipitated by his left knee injury

which occurred in October 1976 and by his heat prostration which occurred in August 1977. It was reported further that they felt that the veteran had a potential for depression which was concealed by his former alcoholism.

In August 1978, the Veteran Administration received medical records entered during the veteran's various periods of hospitalizations from 1971 through 1974. During hospitalization from March 24 to April 6, 1971, the veteran's judgment was impaired and he had partial insight. The diagnosis was alcohol addiction. Hospitalization in June 1971 resulted in a diagnosis of alcohol addiction. During hospitalization from September 15 to 17, 1971, it was reported that the veteran had fear and/or anxiety, loosening of associations, impaired judgment and partial insight.

Discharged summary dated October 12, 1971, revealed that the veteran was rehospitalized on September 25, 1971. On admission, he showed marked dermatitis on his face and arms, which the veteran reported was of 10 days' duration. He was coherent and relevant in his speech but verbally overproductive. Affect was appropriate and mood was anxious. He was correctly oriented in three spheres and memory was intact. Insight and judgment were limited. Routine laboratory workup was within normal limits. The final diagnoses were alcoholic psychosis, other alcoholic hallucinosis; and alcohol addiction.

The veteran was hospitalized from December 28 to 30, 1971. He had fear and/or anxiety, impaired judgment, and partial insight. Physical examination was within

normal limits and the discharge diagnosis was alcohol addiction. During hospitalization from May 14 to 17, 1973, it was reported that physical examination was within normal limits. The veteran's judgment was impaired and he had no insight. The discharge diagnosis was alcohol addiction. He was readmitted on May 20, 1973, and he remained until he eloped in May 1973. During this hospitalization, his judgment was impaired and he had no insight. Final diagnosis was alcohol addiction.

The veteran was hospitalized from February 9 to 12, 1974. He was admitted because of acute symptoms of anxiety and acute alcoholism. The final diagnoses were psychoneurotic reaction and acute alcoholism.

The veteran was hospitalized from October 12 to 19, 1974. The admission was prompted by an episode of acute episodic alcoholism. During the week before admission, the veteran had massive, excessive drinking with the onset of very severe upper gastrointestinal pains, hematemesis and black tarry stools. Mental status examination on admission revealed a very anxious physically distressed male whose face was flushed. He was having severe alcohol withdrawal and unquestionably he had physical pain. Stools were initially positive and then they became negative. Upper gastrointestinal series was within normal limits and the veteran's gastrointestinal symptoms rapidly subsided with a bland diet. Liver function studies showed marked disturbances of liver enzymes. Glucose tolerance test showed a very sharp drop

in the blood sugar to the level of 63 at the fourth hour. The final diagnoses were alcohol addiction, marked alcoholic gastritis, and marked psychopathic personality.

In August 1978, the Veterans Administration received a statement prepared for the signatures of K.B. nd Dr. V. The statement is dated in September 1977 and is substantially to the same effect as their statement dated in August 1977.

The Veterans Administration also received in August 1978 a summary of the first interview Dr. V. had with the veteran in August 1977. It was reported that the veteran felt depressed, anxious, and tense. These feelings were the result of problems associated with his employment. The doctor expressed the opinion that the

veteran's depression was precipitated by his injury and subsequent surgery. The doctor also stated that he felt the veteran had the potential for depression for a long while, but this was covered up by his alcoholism.

The veteran appeared at a hearing conducted by the Board of Veterans Appeals in July 1980. During the hearing, a statement from J.F.C., M.D., dated in May 1979, along with Dr. C.'s resume, was submitted. The doctor stated that he had known the veteran for 7 1/2 years; that the veteran was his patient from 1971 to 1975; that the veteran was a disturbed young man who was impulsive, explosive, and frequently suicidal; and that the veteran had a serious drinking problem secondary to his anxiety. The doctor reported further that, psychiatrically,

with the veteran's anxiety, paranoia, depression and hysteria, he was clearly suffering from a borderline personality (schizophrenic reaction--latent type). He noted that these diagnoses were established during hospitalizations from 1971 to 1973. The veteran testified during the hearing that he began drinking at age 13 for the purpose of relieving anxiety; that during service, he drank to relive tension; that his drinking made him physically sick; that he was hospitalized 33 times from 1971 to 1975; that the hospitalizations were caused by physical distress; that currently he is not receiving psychiatric treatment; and that he had a great deal of difficulty adopting to service.

THE LAW AND REGULATIONS

No educational assistance benefits shall be afforded an eligible veteran under Chapter 34 beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955, or December 31, 1989, whichever is earlier. A veteran may be granted an extension of the applicable delimiting period if the veteran was prevented from initiating or completing the chosen program of education within the otherwise applicable delimiting period because of a physical or mental disability that did not result from the willful misconduct of the veteran. It must be clearly established by medical evidence that such a program of education was medically infeasible. A veteran who is disabled for a period of 30 days or less will not be considered as having been prevented

from initiating or completing a chosen program, unless the evidence establishes that the veteran was prevented from enrolling or reenrolling in the chosen program of education, or was forced to discontinue attendance, because of the short disability. (38 U.S.C. 1662(a); 38 C.F.R. 21.1042, 21.1043)

The simple drinking of alcoholic beverages is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If in drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic

diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin. (38 C.F.R. 3.301(c)(2))

DISCUSSION AND EVALUATION

Under the regulations, the disability of alcoholism is considered to be of willful misconduct origin and may not be a basis for an extension of the delimiting date for Chapter 34 benefits whenever it exists as a primary condition. The record shows numerous hospitalizations from 1971 to 1974 caused by alcoholism. During some of those hospitalizations, physical disabilities were noted, but those physical disabilities were not of sufficient magnitude or duration so as to prevent the veteran from pursuing training

under Chapter 34. During the veteran's brief hospitalization in February 1974, the diagnosis of a psychoneurotic reaction was entered. However, the record fails to establish that the veteran's alcoholism is the result of a neurosis. He began drinking at age 13 and there is no evidence that an acquired psychiatric disease preceded the veteran's alcoholism. The veteran is not currently receiving psychiatric care, which supports the position that his alcoholism was not the result of an acquired psychiatric disease. Simply stated, the evidence does not establish that any innocently acquired disability the veteran may have experienced during the period September 1966 to September 9, 1976, was of sufficient magnitude or duration so as to preclude training. Therefore, there is no basis on which to grant the veteran an extension

of his delimiting date. We have no doubt that if an extension were granted the veteran would use the benefits wisely and become a more productive member of society. Regrettably, an extension of the veteran's delimiting date for educational assistance benefits is not warranted.

FINDINGS OF FACT

1. During the period 1971 to 1974, the veteran was hospitalized a number of times because of alcoholism. The alcoholism was shown to be a primary condition.

2. There was no innocently acquired disability during the period September 1966 to September 9, 1976, which was of sufficient severity so as to prevent the veteran from pursuing training during this period.

CONCLUSION OF LAW

The requirements for extension of the veteran's delimiting date for educational assistance benefits beyond September 9, 1976, are not met. (38 U.S.C. 1662(a); 38 C.F.R. 3.301(c)(2), 21.1042, 21.1043)

DECISION

Entitlement to an extension of the veteran's delimiting date for educational assistance benefits is not established. The appeal is denied.

/s/
J.J. SCHULE

/s/
JACOB J. WEINSTEIN, M.D.

/s/
BRUCE E. HYMAN

IN THE APPEAL OF
JAMES P. MCKELVEY C 28 871 132

BOARD OF VETERANS APPEALS
Washington, D.C. 20420

FINDINGS AND DECISION) Docket No.
RECONSIDERATION) 79-04 991
)
) Date
) February 23, 1982

THE ISSUE

Entitlement to an extension of the veteran's delimiting date for educational assistance benefits.

REPRESENTATION

Appellant represented by: Anne E. Moran, Attorney at Law

WITNESS AT HEARING ON APPEAL

James P. McKelvey, appellant

CONSULTATIONS BY THE BOARD

William J. Reddy, Staff Legal Adviser

ACTIONS LEADING TO PRESENT APPELLATE STATUS

In August 1980, the Board denied an extension of the veteran 's delimiting date for educational assistance benefits. Pursuant to a request by the veteran and his representative, an enlarged panel has been convened for the purpose of reconsidering the case.

CONTENTIONS

In their request for reconsideration, the veteran and his representative set forth five separate contentions:

(1) The Board's determination that the veteran's chronic alcoholism was "willful misconduct" was erroneous;

(2) The Board was incorrect in failing to find that the veteran's mental anxiety

caused his alcoholism and prevented him from using his educational benefits;

(3) The Board was incorrect in failing to find that the veteran's mental anxiety was a secondary result of his alcoholism, and of sufficient severity to entitle him to an extension of his benefits under the regulations; and

(5) The veteran's medical records demonstrated physical disabilities due to alcoholism that entitled him to an extension of his benefits.

FINDINGS OF FACT

After careful consideration of the entire evidentiary record, the Board's prior decision, and the arguments advanced by

the appellant, the Board finds the following:

1. The veteran served on active duty from September 1963 to September 1966.

2. In its decision of August 1980, the Board found that, during the period of 1971 to 1974, the veteran was hospitalized a number of times because of alcoholism. The alcoholism was shown to be a primary condition. The Board also found that the veteran had no innocently acquired disability during the period September 1966 to September 9, 1976, which was of sufficient severity so as to prevent the veteran from pursuing training during this period. The Board determined that, under the regulations, the disability of alcoholism is considered to be of willful misconduct origin and

may not be a basis for an extension of the delimiting date for Chapter 34 benefits whenever it exists as a primary condition. It was noted that, during some of the veteran's hospitalizations for alcoholism, physical disabilities were found but the physical disabilities were not of sufficient magnitude or duration so as to prevent the veteran from pursuing training under Chapter 34. It was also noted that, during a brief hospitalization in February 1974, a diagnosis of psychoneurotic reaction was made. It was further determined that the record failed to establish that the veteran's alcoholism was the result of a neurosis. The Board observed that the veteran began drinking at age 13 and there was no evidence that an acquired psychiatric disease preceded the veteran's alcoholism.

3. The Board finds no obvious error in its decision of August 1980.

THE LAW AND REGULATIONS

The decision of the Board of Veterans Appeals is final, except that the Board may correct an obvious error in the record. Reconsideration of an appellate decision may be accorded by the Board of Veterans Appeals. (38 U.S.C. 4003: 38 C.F.R. 19.148)

No educational assistance benefits shall be afforded an eligible veteran under Chapter 34 beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955, or December 31, 1989, whichever is earlier. A veteran may be granted an extension of the applicable delimiting period if the veteran was prevented from

initiating or completing the chosen program of education within the otherwise applicable delimiting period because of a physical or mental disability that did not result from the willful misconduct of the veteran. It must be clearly established by medical evidence that such a program of education was medically infeasible. A veteran who is disabled for a period of 30 days or less will not be considered as having been prevented from initiating or completing a chosen program, unless the evidence establishes that the veteran was prevented from enrolling or reenrolling in the chosen program of education, or was forced to discontinue attendance, because of the short disability. (38 U.S.C. 1662(a); 38 C.F.R. 21.1042, 21.1043)

The simple drinking of alcoholic beverages is not of itself willful misconduct. The

deliberate drinking of a known poisonous substance or other conditions which would raise a presumption to that effect will be considered willful misconduct. If in drinking of a beverage to enjoy its intoxicating effects, intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin. (38 C.F.R. 3.301(c)(2))

When a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. A

reasonable doubt means a substantial doubt and one within the range or probability as distinguished from speculation or remote possibility. (38 C.F.R. 3.102)

DISCUSSION AND EVALUATION

A final decision of the Board of Veterans Appeals may not be reversed except upon a finding of obvious error. To constitute obvious error, the evidence must be so persuasive of facts contrary to the Board's prior decision as to preclude any other determination. We find no such error in the instant case.

The appellant's primary contention is that the applicable regulation cannot be interpreted to define chronic alcoholism as willful misconduct. It has been the consistent interpretation by the Board that the regulation defines alcoholism as

the "deliberate drinking of a known poisonous substance," and, therefore, is willful misconduct. We are cognizant of the arguments advanced by the appellant against this interpretation. However, we are firm in our belief that the regulation does, indeed, define alcoholism as willful misconduct.

It is also contended that the veteran's psychoneurotic problem, singly, and in relation to his alcoholism, can be used as a basis for an extension of the delimiting date. However, the evidence establishes that the veteran's primary disability was alcoholism, for which he was hospitalized on many occasions. The evidence simply does not establish that the veteran's psychoneurotic problem was of sufficient severity as to prevent him from using his benefits. Similarly, the

medical evidence fails to indicate that the veteran's physical disabilities were of such magnitude or duration as to prevent him from pursuing training.

After a careful review of the entire evidentiary record and careful consideration of the appellant's arguments, we must conclude that the veteran failed to use his benefits by reason of his alcoholism. Accordingly, we must also concluded that the Board's prior decision does not contain obvious error.

The doctrine of reasonable doubt has been considered, but the facts of this case raise no such doubt.

CONCLUSION OF LAW

The decision entered by the Board in August 1980 denying an extension of the

veteran's delimiting date for educational assistance benefits represents the correct application of the governing laws and regulations to the facts found to be shown by the evidence and does not involve obvious error. (38 U.S.C. 4003; 38 C.F.R. 3.102, 19.148)

DECISION

Obvious error not having been found on reconsideration, the Board's decision of August 1980 is affirmed as a final determination. On reconsideration, the benefit sought on appeal remains, denied.

/s/
JACK W. BLASINGAME

/s/
B.G. BROWN, M.D.
(Substituting for DR. WEINSTEIN, who is on extended leave.)

/s/
J.J. SCHULE

/s/
H.H. CLARK

/s/
W.H. YEAGER, M.D.

/s/
C.D. ROMO

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES P. McKELVEY
6972 Deep Cup
Columbia, Maryland 21045
(312) 565-7685

Plaintiff,

v.

HARVEY N. WALTERS,

Administrator of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D. C. 20420,

and

VETERAN'S ADMINISTRATION
810 Vermont Avenue, N.W.
Washington, D. C. 20420,

Defendants.

Civil Action No. 83-2063

COMPLAINT FOR DECLARATORY RELIEF, INJUNCTIVE RELIEF, AND MONEY DAMAGES

This action for declaratory and injunctive relief and for money damages challenges the legality of a

regulation of the Veterans Administration which defines alcoholism as "willful misconduct" and thereby denies certain veterans benefits to individuals entitled to those benefits. This regulation exceeds the statutory authority of its promulgators, creates an irrebutable presumption in violation of the due process clause of the Fifth Amendment, denies those veterans who suffer from alcoholism not caused by "willful misconduct" the equal protection of the laws guaranteed by the Fifth Amendment, and discriminates against the handicapped in violation of the Rehabilitation Act of 1973.

Jurisdiction and Venue

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331 and 1361, and 29 U.S.C. § 794a(a)(2).

2. Venue is proper in this judicial district, in accordance with 28 U.S.C. § 1391(e), because this district is the official residence of defendants.

Parties

3. Plaintiff JAMES P. McKELVEY is a veteran who served in the United States Army from September 1963 to September 1966, and who received an honorable discharge. Mr. McKelvey is a citizen and resident of the State of Maryland.

4. Defendant HARVEY N. WALTERS is the Administrator of Veterans Affairs in Washington, D. C. Defendant is sued in his official capacity. As Administrator, he is responsible for executing the laws relating to veterans benefits and for promulgating regulations that are consistent therewith.

5. Defendant VETERANS ADMINISTRATION is that part of the executive branch responsible for administering the laws relating to veterans benefits. 38 U.S.C. § 210.

FACTS

6. Congress has provided certain educational benefits for veterans that are administered by defendants. James P. McKelvey's honorable service in the United States Army entitled him to these benefits, which, under 38 U.S.C. §§ 1661 and 1662(a)(1), must have been used within ten years after his discharge. Section 1662(a)(1) extends the delimitating date if an educational program could not be initiated or completed within the ten-year period because of a disability that was not the result of the veteran's own "willful misconduct." Defendants have denied Mr. McKelvey an extension of time solely

because of a regulation that conclusively and irrebuttably defines alcoholism as "willful misconduct."

7. Mr. McKelvey began drinking alcoholic beverages at age 13. Both his father and an older brother were alcohol abusers and died as a result of alcohol-related causes.

8. On September 9, 1963, Mr. McKelvey enlisted in the United States Army. During his enlistment, he received several disciplinary sanctions, all drinking-related. He was honorably discharged from the Army on or about September 9, 1966.

9. From 1971 to 1975, Mr. McKelvey underwent 33 successive hospitalizations for alcoholism and/or psychiatric disorders. Between hospitalizations, Mr. McKelvey attended two different educational institutions at which he used his veterans benefits. He

was unable to complete either program because of the debilitating effects of his alcoholism.

10. Mr. McKelvey had his last drink of an alcoholic beverage on or about May 10, 1975. He subsequently received regular psychiatric treatment for depression and phobias. He has been employed on a full-time basis since July, 1975, and for the past four years has been employed by Montgomery County, Maryland, as an alcoholism counselor.

11. On September 9, 1976, the statutory delimiting date for Mr. McKelvey's educational benefits took effect. On November 10, 1977, Mr. McKelvey filed, pursuant to 38 U.S.C. § 1662(a), an application for extension of that delimiting date with defendant Veterans Administration.

12. The Veterans Benefit Law defines "disability" for purposes of

determining claims for veterans benefits, and for determining requests for extensions of time pursuant to 38 U.S.C. § 1662(a)(1), as meaning "a disease, injury, or other physical or medical defect." 38 U.S.C. § 601(1).

13. Alcoholism is a "disability" within the meaning of 38 U.S.C. §§ 601(1) and 1662(a)(1).

14. The Veteran's Benefit Law does not define "willful misconduct." Defendants' pertinent regulation, 38 C.F.R. § 3.301(c)(2), provides as follows:

> The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and

> disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

15. Mr. McKelvey's application was denied solely on the ground that under Veterans Administration regulations, 38 C.F.R. § 3.301(c)(2), alcoholism is considered "willful misconduct," and thus is barred as a basis for extension of benefits under 38 U.S.C. § 1662(a)(1).

16. The denial of Mr. McKelvey's application was appealed timely and in accordance with Veterans Administration procedures. On August 6, 1980, the Board of Veterans Appeals denied the appeal solely on the basis of 38 C.F.R. § 3.301(c)(2). It refused to consider any evidence that Mr. McKelvey's alcoholism was not caused by "willful misconduct," concluding that it

was bound by defendants' regulation.

17. Mr. McKelvey filed a request for reconsideration with the Board on August 4, 1981. On February 23, 1982, the Board affirmed its prior decision.

18. Mr. McKelvey has exhausted his administrative remedies.

Claims for Relief

19. Alcoholism is not necessarily caused by "willful misconduct" and thus may constitute a disability within the meaning of 18 U.S.C. § 1662(a)(1). Mr. McKelvey's alcoholism was not caused by "willful misconduct," and was a disability under the statute. Consequently, Mr. McKelvey was entitled to an extension of his delimiting date.

20. Defendants' regulation, 38 C.F.R. § 3.301(c)(2), denies veterans suffering from alcoholism not caused by "willful misconduct" those educational

benefits to which they are entitled by Act of Congress, and therefore exceeds defendants' statutory authority under 38 U.S.C. § 210(c)(1).

21. Moreover, defendants' regulation creates an irrebuttable presumption in violation of the due process clause of the Fifth Amendment, and further violates the Fifth Amendment by denying the equal protection of the laws to veterans who suffer from alcoholism not caused by "willful misconduct."

22. The Rehabilitation Act of 1973, as amended in 1978, 29 U.S.C. § 706(7), provides that persons with a history of alcoholism are "handicapped" and entitled to its protection. Defendant Veterans Administration is required to comply with Section 504 of the Act, 29 U.S.C. § 794, which provides in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation, be denied the benefits of, or be subjected to discrimination under any program or activity . . . conducted by any Executive Agency . . . .

The Act further provides that defendants "shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation . . . Act of 1978." Defendants have failed to review their existing regulations and to promulgate new regulations which satisfy their obligations under the Rehabilitation Act, as amended, and have otherwise violated plaintiff's statutory right to nondiscrimination.

23. As a result of defendants' misconduct, plaintiff has suffered and will continue to suffer irreparable injury. Among other things,

he has been unable to complete a course of study which would enable him to pursue his desired occupation, and has therefore lost several years during which he could have utilized his skills and experience in the manner most beneficial both to himself and to society. He has also been stigmatized, as have all veterans suffering from the disease of alcoholism, by defendants' insistence, contrary to medical evidence, that he was the sole cause of the disease from which he suffered.

24. As a further result of defendants' misconduct, plaintiff has suffered monetary damages in an amount of not less than $2,000 for expenses incurred in pursuing an education that should properly have been borne by defendants, and will suffer further damages in the pursuit of his education absent the relief requested.

WHEREFORE, plaintiff requests the Court to:

(A) Enter a declaratory judgment that the challenged regulation, 38 C.F.R. § 301(c)(2), violates 38 U.S.C. §§ 210(c)(1), 1661 and 1662(a)(1), the due process and equal protection clauses of the Fifth Amendment, and 29 U.S.C. §§ 706(7) and 794.

(B) Issue a permanent injunction:

1. Restraining defendants and their agents and appointees from applying 38 C.F.R. § 301(c)(2) to plaintiff;

2. Granting plaintiff's application for an extension of his delimiting date or, alternatively, remanding the case to defendant Veterans Administration with directions that defendants reconsider Mr. McKelvey's

application without regard to 38 C.F.R. § 3.301(c)(2); and

3. Requiring defendants to amend and promulgate regulations by Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794, and to do so pursuant to the procedures set forth in the Administrative Procedure Act, 5 U.S.C. § 553, and 38 C.F.R. § 1.12.

(C) Award plaintiff his damages.

(D) Award plaintiff the costs of this action, including reasonable attorneys fees.

(E) Grant plaintiff such other and further relief as may be appropriate.

Respectfully submitted,

/s/Douglas E. Winter
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Date: July 19, 1983

SUPREME COURT OF THE UNITED STATES

No. 86-737

James P. McKelvey,

Petitioner

v.

Thomas K. Turnage, Administrator, Veterans Administration, et al.

ORDER ALLOWING CERTIORARI.
Filed March 9, 1987.

The petition herein for a writ of certiorari [to] the United States Court of Appeals for the District of Columbia is granted. This case is consolidated with 86-622, Eugene Traynor v. Thomas K. Turnage, Administrator, Veterans Administration, et al., and a total of one hour is allotted for oral argument.

Justice Scalia took no part in the consideration or decision of this petition.

ADMINISTRATOR'S DECISION, VETERANS' ADMINISTRATION, NO. 2

March 21, 1931.

Subject: Interpretation of term "willful misconduct" in disability allowance provision.

QUESTION PRESENTED: Whether certain veterans who are suffering from jaic paralysis are barred from receiving disability allowance on the theory that the disability is the result of their own willful misconduct.

COMMENT: Claimants are suffering from paralysis caused by drinking so-called jamaica ginger. The second paragraph of section 200 of the World War Veterans' Act, as amended July 3, 1930, authorizes the payment of disability allowance to "any honorably discharged

ex-service man who entered the service prior to November 11, 1918, and served 90 days or more during the World War, and who is or may hereafter be suffering from a 25 percentum or more permanent disability, as defined by the director, not the result of his own wilful misconduct * * *."

In passing on the question as to whether a claimant who became blind from wood alcohol poisoning as result of drinking whiskey, was entitled to disability allowance, the Attorney General of the United States in an opinion dated January 20, 1931, held that the phrase "willful misconduct" involves something in the n ature of conscious wrongdoing and said:

> There being no law prohibiting the drinking of intoxicating liquor, no evidence that the veteran knew the liquor might blind him, in short, no evil intent of any kind, I am of the opinion that the veteran is eligible to receive a disability allowance.

The Attorney General further referred to the fact that the Supreme Court of the United States in the case of United States v. Farrar, 281 U.S. 624, held that the ordinary purchaser of intoxicating liquor is not subject to prosecution under the National Prohibition Act. It follows that a disability resulting from drinking jamacia ginger, a substitute for intoxicating liquor, is not, generally speaking, the result of the claimant's own wilful misconduct. This rule can not be applied to bring in all cases of disability resulting from drinking jamaica ginger nor all of those in which disability is due to the drinking of whiskey or other intoxicants. The main principle involved is that the simple drinking of any alcoholic beverage, whether jamaica ginger, whiskey or other liquor, is not in and of itself wilful misconduct. However, in the event other

circumstances exist in a given case, such as deliberate drinking where the drink was known to be poisonous, or under conditions which would raise a presumption to the effect, the element of wilful misconduct immediately assumes proportions. Further, if in the drinking of any beverage for the purpose of enjoying its intoxicating effects, excessive indulgence leads to disability, wilful misconduct would undoubtedly inhere in the act but where, as is true in the jaic paralysis cases which are presented here for consideration, indulgence leads to disability because the beverage itself is poisonous and essentially destructive of life and health, although the drink which they believe they are taking would not be, wilful misconduct can not be found in the absence of other circumstances from which it can be imputed. An examination

of the three cases submitted for decision does not disclose any evidence along this latter line.

HELD: The claimants are not within the prohibition of the misconduct clause of the disability allowance provision. (Decision of the Administrator of Veterans' Affairs, dated Mar. 13, 1931.)

The foregoing decision is hereby promulgated for observance by all officers and employees of the Veterans' Administration.

FRANK T. HINES,
Administrator of Veterans' Affairs.

ADMINISTRATOR'S DECISION, VETERANS' ADMINISTRATION NO. 988, August 13, 1964

Subject: INTERPRETATION OF THE TERM "WILLFUL MISCONDUCT" AS RELATED TO THE RESIDUALS OF CHRONIC ALCOHOLISM

QUESTION PRESENTED: Whether changes should be made in the criteria currently followed for determining when disability or death is the result of the veteran's own willful misconduct because of use of alcohol as a beverage.

COMMENTS: Statutes currently authorizing disability and death compensation, dependency and indemnity compensation, and pension benefits preclude payment of such benefits when it is determined that the disability or death is the result of the veteran's own willful misconduct. See for example 38 U.S.C. 105, 310, 410(a) and 521(a). The provisions thereof respecting willful

misconduct are similar to corresponding ones in earlier statutes previously in effect for many years. See section 300 of the former War Risk Insurance Act and section 200 of the former World War Veterans' Act, 1924. Of note also are similar provisions in the former Veterans' Regulation No. 10, with respect to benefits under Public No. 2, 73d Congress.

Criteria now applicable generally for determining when disability or death is the result of misconduct because of the use of alcohol as a beverage are set out in Administrator's Decision No. 2 promulgated March 21, 1931. Such general criteria are summarized in paragraph 14.04c of M21-1, in part, as follows:

"Basic principles for application in deciding cases involving alcoholism

are stated in Administrator's Decision No. 2, under which a finding of willful misconduct is to be made where a veteran drinks a poisonous beverage (methyl alcohol), knowing it to be poisonous or under circumstances that would raise a presumption to that effect, or when he drinks any alcoholic beverage for the purpose of enjoying its intoxicating effects and indulges to such an extent that his excessive indulgence results in a disease or disability. Excessive indulgence is not confined to the cases of chronic alcoholics and the fact that a veteran was not a chronic alcoholic is not material. The question involved is: Was there excessive indulgence and was it the proximate cause of the injury or disease in question."

In the present VA Regulation 1001(N) it is said that willful misconduct "means an act involving conscious wrongdoing or known prohibited action"; and that "it involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." The regulation provides further that "willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death."

The injurious effects of drinking alcohol may be placed generally into two distinct groups:

(a) The proximate and immediate effects consisting of disabling injuries or death resulting from a state of intoxication, and,

(b) The remote, organic secondary effects of the continued use of alcohol resulting in impairment of body organs or systems leading to disability or death.

One can, and very reasonably should, be held responsible for the extent and degree of his own drunkeness on individual occasions. So, to willingly achieve a drunken state and while in this condition to undertake tasks for which his condition renders him physically and mentally unqualified, is to act "with wanton and reckless disregard" of the probable consequences of drinking. Such, of course, is willful misconduct. In misconduct determinations, however, with respect to mental disorders where the use of alcohol as a beverage has been involved, a distinction has heretofore been recognized between alcoholism as a

primary condition (or as secondary to an underlying personality disorder), and alcoholism as secondary to and a manifestation of an acquired psychiatric disorder. If the latter condition is found the resulting disability or death is not to be considered as willful misconduct.

The principle thus recognized is applicable to other than mental disorders. With common social acceptance of the use of alcohol as a beverage, onset of the secondary condition may be very insidious in its development. Under such circumstances the development of the secondary condition does not meet the definition of intentional wrongdoing with knowledge or wanton disregard of its probable consequences. Secondary results are not the usual and probable effects of drinking alcohol as a beverage. By the

time there is sufficient awareness of any probable deleterious consequences, the process has developed to a point where it is irreversible without professional help. At such time, the person by himself, may lack the capacity to avoid the continued use of alcohol. While it is proper to hold a person responsible for the direct and immediate results of indulgence in alcohol, it cannot be reasonably said that he expects and wills the disease and disabilities which sometimes appear as secondary effects. These may range from cirrhosis of the liver to gastric ulcer, peripheral neuropathy, vitamin deficiency, chronic brain syndrome or simply acceleration of debility of age. These diseases also appear in the population without any relation to alcohol. Such resulting secondary conditions may properly be

excluded in the criteria respecting willful misconduct without doing harm to the language or intent of the applicable statutes.

It should be noted, further, that, historically, the question of willful misconduct has never been raised in other related situations where personal habits or neglect are possible factors in the incurrence of disability. For example, the harmful effects of tobacco smoking on circulation and respiration were known long before tobacco was incriminated as a causative factor in the high incidence of cancer, emphysema and heart disease. Yet smoking has not been considered misconduct. It is unreasonable and illogical to apply one set of rules with respect to alcohol and a different one in a situation closely analogous.

HELD: Current criteria concerning the use of alcohol as a beverage and its consequences will be continued except that organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin. Administrator's Decision No. 2 is modified accordingly.

This opinion is hereby promulgated for observance by all officers and employees of the Veterans' Administration.

/s/ J. S. GLEASON, Jr.
Administrator

Veterans Administration
Program Guide PG21-1
November 9, 1976

Section 0-17
(Revised)
Change 243

RATING PRACTICES AND PROCEDURES

DISABILITY

MISCONDUCT

Organic Disablement Due to Alcohol. Administrator's Decision 988 removed from the category of misconduct organic disablement which is a secondary result of the use of alcohol as a beverage. This change supersedes the longstanding rule set forth in A.D. 2 which held that willful misconduct would inhere in the act of drinking alcoholic beverages where excessive indulgence led to disability. This change of policy is based on the principle that it cannot be maintained that the veteran expects and "wills" the diseases and disabilities which sometimes appear as secondary effects because of indulgence in alcohol.

The bad effects of drinking alcoholic beverages can be placed generally into two distinct groups:

(a) The proximate and immediate effects consisting of disabling injuries or death resulting from a state of intoxication.

(1) No change is made in the existing rule under which disability or death due to automobile, household or other accidents directly resulting from acute intoxication are classified under willful misconduct.

(2) Injury or death caused by fighting, misuse of firearms, etc., directly and proximately resulting from drunkenness are not compensable or pensionable under this revision.

(b) The remote, organic secondary effect of the continued use of alcohol resulting in impairment of body

organs or systems leading to disability or death.

(1) Under this revision, organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, should not be considered to be of willful misconduct origin.

(2) These conditions may range from cirrhosis of the liver to gastric ulcer, peripheral neuropathy, vitamin deficiency, chronic brain syndrome or simply acceleration of disability of age.

The provisions of VA Regulation 1114(A) are applicable to this liberalization. Benefits under this revision may not be awarded prior to the date of approval, August 13, 1964.

Claims will be adjudicated under this change of policy as they are encountered in the course of otherwise required adjudication.

* * * *

4.04 EXTENSION OF DELIMITING DATE BASED ON DISABILITY

(a) General. The delimiting date of a veteran . . . may be extended if it is determined that he or she was prevented from initiating or completing a chosen program of education because of a physical or mental disability.

(1) In this context, the term, "program of education" refers to a course or curriculum pursued in an educational institution or training establishment (38 U.S.C. 1652(b) and (c), and 1787(c)).

(2) Physical or mental disabilities which result from the

applicant's own misconduct do not qualify the person for an extension of his or her delimiting date.

(3) The length of any extension granted will equal the length of time it is determined that the eligible person was prevented from initiating or completing a program of education within the basic 10-year period of eligibility.

(4) These provisions are retroactive to May 31, 1976.

(b) Application Date. Applications for an extension of a delimiting date under this provision must be received in the VA by the latest of the following dates:

(1) November 23, 1978; or

(2) One year after the veteran's basic delimiting date; or

(3) One year after the date on which the veteran became able to initiate or continue training following

recuperation from the disability.

(c) Application Forms.

* * * *

d. Required Information on Application. Both a statement from the claimant and supporting medical evidence will be required to establish eligibility to an extended delimiting date based on disability.

(1) Statement From Claimant. The claimant must submit a signed statement containing the following information:

(a) The type of disability claimed.

(b) The beginning and ending dates of any period or periods during which the claimant was unable to pursue training because of the claimed

disability, and the claimant's reason(s) for being unable to begin or continue his or her training program due to the disability.

(c) The claimant's statement of how the disability was incurred, if known.

(d) A statement of the claimant's employment history during the period that he or she was unable to pursue training because of the disability. Dates and weekly hours of employment, names and addresses of employers, and types of jobs held should be specified.

(2) Medical Evidence. Medical evidence clearly establishing the nature and duration of the

disability must be submitted. Such evidence will consist of:

(a) A statement by an attending physician, reporting diagnosis and treatment, the period(s) of disability, and the physician's prior and current evaluation of the feasibility of employment or training for the claimant. The statement should also indicate the date(s) when, in the opinion of the physician, training was first medically feasible.

(b) Other supporting evidence, such as hospital reports or results of laboratory tests.

(c) If, after full development, the claimant is unable to furnish medical

evidence of a disability, the claim will be disallowed with referral to the rating board.

e. Determinations. A favorable decision to extend a claimant's delimiting date under this provision requires the finding of the existence of a physical or mental disability which precluded training, establishment of the duration of such a disability, and a finding of the absence of willful misconduct on the part of the claimant for incurrence of the disability.

(1) Rating Decisions. Judging the existence of a physical or mental disability will be the responsibility of a VA rating board and will include establishment of the beginning and ending dates for the period or periods during which training was precluded by disability. These decisions will be

presented in a memorandum rating. (See M21-1, Ch. 47, par. 47.17.)

(a) Existence of a physical or mental disability which precluded training will be found if medical evidence clearly establishes a diagnosable disease, injury, or other defect judged to have made training medically infeasible.

(b) Notwithstanding medical evidence of a disability, medical infeasibility of training ordinarily may not be found for any period during which the claimant was employed full time. However, the rating board will ensure (1) that such employment was not part of a medically prescribed rehabilitation program; or (2) did not otherwise indicate an inability

to pursue training effectively before finding that training was not precluded.

(2) Willful Misconduct. When necessary, determinations concerning willful misconduct will be made in accordance with M21-1, chapter 14, paragraph 14.04. If such a decision is within the jurisdiction of the rating board (cases involving disease, paragraph 14.04e(1)), the decision will be incorporated in the memorandum rating. Otherwise, a separate administrative decision prepared by the Authorization activity is required.

(3) Disabilities of Less Than 30 Days' Duration. A disability of less than 30 days' duration will not entitle a claimant to a delimiting date extension unless the claimant

shows exceptional circumstances which prevented him or her from enrolling or reenrolling in the chosen program of education, or the claimant was forced to discontinue attendance because of the short disability. A statement from the claimant citing the specific circumstances (for example, registration or examination dates with which the disability interfered) will be accepted in the absence of contradictory information.

(a) If. after the rating board was determined the inclusive dates when training was not medically feasible, the evidence of record does not warrant a finding that the brief period of disability

prevented enrollment or reenrollment, the claim will be disallowed.

(b) A dictated letter of disallowance will inform the claimant of the period during which the VA has determined training was not medically feasible. The letter will explain why the evidence does not establish acceptable exceptional circumstances which would have prevented enrollment or reenrollment during the period of disability.

(c) If the claimant later submits additional evidence of exceptional circumstances, eligibility to an extension of delimiting date will be reconsidered.

* * * *

f. Length of Period of Disability. The length of the period of disability will be determined by an adjudicator as follows:

(1) Beginning Date. The beginning of the period will be the first day of the claimant's 10-year delimiting period or the first day on which the claimant's disability rendered training medically infeasible (as determined by the rating board), whichever is later.

(2) Ending Date. The ending of the period will be the earliest of the following dates:

(a) The date of the first ordinary term (summer sessions are excluded) following the date on which training became medically feasible.

* * * *

(b) The date on which the claimant enrolled or reenrolled after the period of disability if such date precedes the date specified in subparagraph (a) above.

(c) The claimant's basic delimiting date. NOTE: The length of any extension granted on account of disability will not provide any individual with more than ten years of eligibility during which training was medically feasible.

g. Chosen Program of Education. The claimant may select any approved program of education during an extended delimiting period, provided that the program selected would have been available to the claimant during his or her basic period of eligibility at the time disability prevent training.

* * * *

h. Determining Beginning and Ending Dates.

(1) Beginning Date. The claimant will elect the effective (beginning) date of the extended delimiting period:

(a) This elected date may be as early as the claimant's basic delimiting date or as late as the first day of the first ordinary term (excluding summer session) at the claimant's school which begins 90 days or more after VA approval of the delimiting date extension.

(b) An explanation of this election, including a statement of the date which appears most advantageous to the claimant (if this can be determined), will be included

in the notification of approval sent to the claimant.

(c) The claimant will also be informed that this election, once it has been made, is irrevocable.

(2) Ending Date. The ending date of the extended period will be established by adding the length of the period of disability determined under subparagraph f above to the beginning date of the extended period. The day after this ending date becomes the claimant's new delimiting date for educational benefit purposes. Once an extended delimiting date has been granted, it will not be extended further because of either recurrence of disability or the onset of a new disability when such recurrence or onset is

after the claimant's basic delimiting date. Although benefit payments may be made up to the new delimiting date, payments will not be continued beyond the limits of the veteran's entitlement, but see paragraph 5.03 regarding allowable extensions of entitlement.

i. Notification to the Claimant.

(1) Disallowances. The claimant will be informed of a disallowance of an application for extended delimiting date by dictated letter giving the specific reason for disallowance and enclosing full statement of appellate and procedural rights.

(2) Approvals. If the application for an extended delimiting date is approved, the claimant will be

notified at once by dictated letter. The following information will be included on the notification:

(a) The length of time the extended period will run, and a clear explanation of how this period was determined.

(b) An explanation of the possible beginning dates for the extended delimiting period as specified in subparagraph h(1) above and a request for the claimant's election of the beginning date. VA Form 21-4138 will be enclosed for the claimant's use. He or she must also be made aware that the election will be final after it is made and the extended delimiting period will run continuously from the chosen beginning date.

(c) The claimant will be informed of the approval or disapproval of the program of education for which he or she has applied. If no program has been indicated by the claimant, the claimant will be asked to furnish to statement which identifies his or her chosen program. The availability of VA counseling will also be explained.

(d) Notice of appeal and procedural rights will be enclosed.

14.04 WILLFUL MISCONDUCT AND VICIOUS HABITS DETERMINATIONS

a. General. Willful misconduct is basically the intentional doing of something either with knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences.

(1) A determination will be made as to willful misconduct when a death or disability which affects entitlement was incurred under questionable circumstances.

(2) The principles stated in paragraph 14.03a regarding circumstances which do not warrant raising questions as

to line of duty are applicable to willful misconduct. (See VAR 1001(N).)

b. Proximate Cause. Injury may not be held due to willful misconduct on the basis of an act "malum in se" or "malum prohibitum" unless the wrongful act was in and of itself the proximate cause of the resulting injury.

c. Alcoholism. Basic principles for application in deciding cases involving alcoholism are stated Administrator's Decision No. 988, which classifies the injurious effects of drinking alcohol into two distinct groups.

(1) Proximate and Immediate Effects. A person will be held responsible for disabling injuries or death which resulted directly and immediately from indulgence in alcohol in an individual occasion. The willingness to achieve a drunken state and while in this condition to undertake tasks for which

unqualified physically and mentally by alcohol is willful misconduct.

(a) Determinations [of willful misconduct in such cases] will depend upon the facts found in the individual cases, but care should be exercised to guard against findings of willful misconduct on the basis of inconclusive evidence. [An adverse determination requires that] there must be excessive indulgence which was the <u>proximate cause</u> of the disability or death in question.

* * * *

(2) Organic Secondary Effects. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise are not to be considered of a willful misconduct origin. The development of the secondary condition does not meet the definition of intentional wrongdoing with knowledge or

wanton disregard of its probable consequences.

* * * *

e. Responsibility For Determinations

(1) Willful Misconduct. The rating board will determine the issue in cases involving disease or suicidal death (VAR 1301 and 1302). All other determinations are the responsibility of the Authorization unit.

(2) Vicious Habits. The meaning of "vicious habits" is stated in VAR 1301(B) and its application is limited to disability pension cases. The significance is usually medical in nature and when related to etiology of a disease the question is for consideration by the rating board.

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Nos. 86-622 and 86-737

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Second Circuit and the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether a Veterans' Administration regulation that conclusively defines alcoholism as willful misconduct discriminates against the handicapped in violation of § 504 of the Rehabilitation Act of 1973?

2. Whether the federal courts have jurisdiction to consider a challenge to the validity of a Veterans' Administration regulation that violates § 504 of the Rehabilitation Act of 1973?

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Respondents.

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THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, and VETERANS' ADMINISTRATION,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT

This brief is submitted on behalf of Eugene Traynor, petitioner in No. 86-622, and James P. McKelvey, petitioner in No. 86-737. Mr. Traynor seeks the reversal of a decision of the United States Court of Appeals for the Second Circuit; Mr. McKelvey seeks

the reversal of a portion of a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The majority and dissenting opinions of the Second Circuit in *Traynor* are reported at 791 F.2d 226 (2d Cir. 1986) (*Traynor* Cert. Pet. 1a-38a). The opinion of the district court is reported at 606 F. Supp. 391 (S.D.N.Y. 1985) (*Traynor* Cert. Pet. 39a-82a).

The majority and dissenting opinions of the D.C. Circuit in *McKelvey* are reported at 792 F.2d 194 (D.C. Cir. 1986) (*McKelvey* Cert. Pet. 1a-31a). The opinion of the district court is reported at 596 F. Supp. 1317 (D.D.C. 1984) (*McKelvey* Cert. Pet. 32a-47a).

JURISDICTION

The judgment of the Court of Appeals in *Traynor* was entered on May 16, 1986, and a timely motion for rehearing and rehearing *en banc* was denied on July 15, 1986. (*Traynor* Cert. Pet. 1a, 81a.) Mr. Traynor's petition for writ of certiorari was filed on October 14, 1986.

The judgment of the Court of Appeals in *McKelvey* was entered on May 30, 1986, and a timely motion for rehearing and rehearing *en banc* was denied on August 7, 1986. (*McKelvey* Cert. Pet. 48a, 49a, 50a.) Mr. McKelvey's petition for writ of certiorari was filed on November 5, 1986.

Both petitions for certiorari were granted on March 9, 1987. J.A. 132. The jurisdiction of this Court in

both cases is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

STATUTES AND REGULATIONS INVOLVED

Section 504 of the Rehabilitation Act of 1973, 92 Stat. 2982, 2987 (1978), 29 U.S.C. § 794 (1982), provides in pertinent part:

> No otherwise qualified individual with handicaps in the United States, as defined in § 706(8) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive Agency . . . .

Section 7(8) of the Rehabilitation Act of 1973, 92 Stat. 2984, 2985 (1978), 29 U.S.C. § 706(8) (1982), defines "individual with handicaps" as follows:

> (A) Except as otherwise provided in subparagraph (B), the term 'individual with handicaps' means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.
>
> (B) Subject to the second sentence of this subparagraph, the term "individual with handicaps" means, for purposes of subchapters IV and V of this chapter, any person

> who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For purposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

Time limitations for using veterans' educational benefits are established by 91 Stat. 1439 (1977), 38 U.S.C. § 1662(a)(1) (1982), which provides in pertinent part:

> No educational assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall . . . be granted an extension of the applicable delimiting date for such length of time as the Administrator determines, from the evidence, that such veteran was so pre-

vented from initiating or completing such a program of education.

Jurisdiction to review certain Veterans' Administration decisions is limited by 84 Stat. 787, 790 (1970), 38 U.S.C. § 211(a) (1982), which provides as follows:

> (a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

The term "willful misconduct" is defined generally under Veterans' Administration regulations at 38 C.F.R. § 3.1(n) (1986):

> "Willful misconduct" means an act involving conscious wrongdoing or known prohibited action (malum in se or malum prohibitum). A service department finding that injury, disease or death was not due to misconduct will be binding on the Veterans Administration unless it is patently inconsistent with the facts and the requirements of laws administered by the Veterans Administration.
>
> (1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and

> reckless disregard of its probable consequences.
>
> (2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.
>
> (3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death.

More specifically, a Veterans' Administration regulation codified at 38 C.F.R. § 3.301(c)(2) (1986) ("the willful misconduct regulation"), has been interpreted by the VA to define alcoholism as willful misconduct:

> The simple drinking of alcoholic beverage is not itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

STATEMENT OF THE CASES

No. 86-622. Eugene Traynor is a veteran who began drinking to intoxication before he was ten years old. 606 F. Supp. at 393 (*Traynor* Cert. Pet. 41a). His

drinking became progressively worse, and while on active duty in the Army in 1968 and 1969 he suffered both seizures and disciplinary sanctions because of his alcoholism. He was honorably discharged from the Army on August 27, 1969. 606 F. Supp. at 393 (*Traynor* Cert. Pet. 42a-44a).

Between 1970 and 1974, Mr. Traynor was hospitalized repeatedly for alcoholism and related illnesses, and was diagnosed as having "primary" alcoholism, a term used by the Veterans' Administration ("VA") to denote alcoholism without an underlying psychiatric disorder. *Id.* During that time, his active alcoholism made it impossible for him to pursue any education, or to use veterans' educational assistance benefits to which he was entitled under 38 U.S.C. § 1661 (1982).

In 1974, following his last hospitalization, Mr. Traynor succeeded in overcoming his alcoholism. 606 F. Supp. at 394 (*Traynor* Cert. Pet. 46a). From 1977 until 1979, he attended college part-time, and used nine and one half of the 24 months of veterans' benefits to which he was entitled. 606 F. Supp. at 394 (*Traynor* Cert. Pet. 47a-49a). His original ten-year delimiting period for using those benefits expired on August 27, 1979. *See* 38 U.S.C. § 1662(a)(1) (1982).

In early 1979, Mr. Traynor applied for an extension of time to use his remaining benefits on the ground that his alcoholism had prevented him from pursuing his education until 1977. *See id.* Because the disability that delayed his education—"primary" alcoholism—is conclusively deemed as "willful misconduct" by the VA pursuant to 38 C.F.R. § 3.301(c)(2) (1986)[1], the

[1] *See* p. 6 *supra*. This regulation is referred to throughout this brief as "the willful misconduct regulation."

VA denied the extension. 606 F. Supp. at 395 (*Traynor* Cert. Pet. 49a-50a); *see also id.* at 88a-89a (VA Rating Decision). His benefits were terminated on August 27, 1979.

Mr. Traynor appealed to the Board of Veterans' Appeals ("Board" or "BVA"). He argued, among other things, that the VA's classification of alcoholism as willful misconduct ignored established medical authority that alcoholism is an illness rather than deliberate conduct, and that the willful misconduct regulation violated the Constitution and the nondiscrimination mandate of the Rehabilitation Act. (*Traynor* Cert. Pet. 148a-149a; R. 8 (8/1/80 Hearing Tr. at 10-11, 15-22, 25-26, 28-30, 34-35)). Without even acknowledging these contentions, the Board denied his appeal on December 17, 1980. (*Traynor* Cert. Pet. 91a-102a).

On Mr. Traynor's motion for reconsideration, the Board again denied the appeal. (*Traynor* Cert. Pet. 103a-121a). The Board stated that it was not "the proper forum" for his constitutional and statutory challenges to the validity of the willful misconduct regulation, and concluded that it was "bound . . . by regulations of the Veterans Administration." (*Traynor* Cert. Pet. 107a-108a, 116a).

Mr. Traynor then brought an action for declaratory and related relief in the United States District Court for the Southern District of New York. He claimed that the willful misconduct regulation and its conclusive classification of "primary" alcoholism as "willful misconduct" were contrary to § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1982), as well as the Fifth Amendment to the Constitution . J.A. 8.

On cross-motions for summary judgment, the district court ruled that it had jurisdiction to review Mr. Traynor's challenges to the willful misconduct regulation, notwithstanding 38 U.S.C. § 211(a) (1982). 606 F. Supp. at 395-96 (*Traynor* Cert. Pet. 53a-59a). While finding that the regulation withstood constitutional scrutiny, 606 F. Supp. at 396-98 (*Traynor* Cert. Pet. 59a-65a), the district court recognized that the regulation's conclusive classification of "primary" alcoholism as "willful misconduct," which "exclud[ed] those with a history of primary alcoholism from consideration for extensions of delimiting dates[,] contravene[d] the Rehabilitation Act by discriminating against those rehabilitated alcoholics . . . most deserving of aid" solely on the basis of their handicap. 606 F. Supp. at 401 (*Traynor* Cert. Pet. 80a-81a). Declaring the regulation invalid under § 504 of the Rehabilitation Act, the court remanded the case to the VA for further proceedings. (*Traynor* Cert. Pet. 83a-84a).

On appeal, a divided panel of the Second Circuit reversed, holding that 38 U.S.C. § 211(a) precluded judicial review of Mr. Traynor's statutory challenge. The majority assumed that Mr. Traynor sought to overturn the VA's *application* of the challenged regulation to the facts of his case, and read § 211(a) to immunize from judicial review "all decisions of the VA on 'any question of law or fact.' " 791 F.2d at 229 (*Traynor* Cert. Pet. 13a). The Second Circuit therefore declined to reach the merits of the Rehabilitation Act claim. 791 F.2d at 226-231 (*Traynor* Cert. Pet. 1a-25a).

In dissent, Judge Kearse pointed out that, contrary to the majority's broad reading of the statutory lan-

guage, § 211(a) "immunizes from judicial review . . . only decisions of the VA on a 'question of law or fact *under any law administered by the Veterans' Administration providing benefits for veterans,*' " 791 F.2d at 232 (*Traynor* Cert. Pet. 29a) (emphasis in original). She concluded for two reasons that § 211(a) does not deprive the federal courts of jurisdiction to determine whether the willful misconduct regulation violates § 504:

> First, this question is not one that arises under a law that is administered by the VA or that provides benefits for veterans; rather it arises under the Rehabilitation Act, which does not provide veterans' benefits and is not administered by the VA. Second, the Administrator did not in fact decide this question but rather disclaimed jurisdiction to decide it.

791 F.2d at 232 (*Traynor* Cert. Pet. 28a-29a.)

No. 86-737. James P. McKelvey is a recovered alcoholic who began drinking at age 13. 596 F. Supp. at 1323 (*McKelvey* Cert. Pet. 43a). During his enlistment in the United States Army, he received several disciplinary sanctions, all of which were drinking-related. Mr. McKelvey was honorably discharged from the Army in September, 1966.

In the nine years after his discharge, Mr. McKelvey was hospitalized repeatedly for alcoholism and related problems. 792 F.2d at 187 (*McKelvey* Cert. Pet. 4a). Between hospitalizations, Mr. McKelvey attended two educational institutions, using veterans' educational benefits. 38 U.S.C. § 1661 (1982). He was unable to complete his education because of the debilitating ef-

fects of his alcoholism. R. 8 (transcript of July 1980 BVA hearing). Mr. McKelvey had his last drink of alcohol in May 1975. 792 F.2d at 197 (*McKelvey* Cert. Pet. 4a). He subsequently received regular psychiatric treatment. R. 8 (transcript of July 1980 BVA hearing).

On September 10, 1976, the ten-year delimiting date for use of Mr. McKelvey's educational benefits passed. In 1977, pursuant to 38 U.S.C. § 1662(a)(1) (1982), he sought an extension of his delimiting date on the ground that his alcoholism had prevented earlier use of his benefits. 792 F.2d at 197 (*McKelvey* Cert. Pet. 4a). His request was denied by the VA, which determined that Mr. McKelvey's disability had resulted from "willful misconduct." The VA's determination was based exclusively upon the willful misconduct regulation. *Id.* (*McKelvey* Cert. Pet. 4a-5a).

Mr. McKelvey appealed the VA's decision. In July 1980, at the Board of Veterans' Appeals hearing on Mr. McKelvey's case, the Chairman stated:

> I want to make one thing clear . . . I am aware of the medical disagreement about what kind of an animal alcoholism is. As far as we are concerned at the Board of Veterans Appeals, we don't have discretion to say that primary alcoholism is a disease. It is defined in the regulations as willful misconduct and whether we want to call it a disease or not, we have no authority to do that, we're bound by those regulations . . . .

J.A. 83-84. Because the Board found "no evidence that an acquired psychiatric disease preceded [McKelvey's] alcoholism," it was thus bound by regulation

to hold that Mr. McKelvey's alcoholism was "willful," and it denied an extension. 792 F.2d at 197 (*McKelvey* Cert. Pet. 5a); *see* J.A. at 100-03, 114.

Mr. McKelvey challenged the Board's decision in the United States District Court for the District of Columbia. Mr. McKelvey raised both constitutional and statutory issues, including a claim that the willful misconduct regulation violated § 504 of the Rehabilitation Act, as amended, 29 U.S.C. § 794 (1982) . The VA argued that 38 U.S.C. § 211(a) (1982) precluded judicial review. Judge Parker disagreed, stating that Mr. McKelvey did not "seek review of any factual findings of the Veterans Administration," but rather "a judicial determination that a regulation promulgated by the VA is contrary to § 504 of the Rehabilitation Act." 596 F. Supp. at 1320 (*McKelvey* Cert. Pet. 35a-36a). Judge Parker then granted summary judgment for Mr. McKelvey on the Rehabilitation Act claim, and remanded the case to the VA to consider whether Mr. McKelvey's alcoholism constituted willful misconduct within the meaning of 38 U.S.C. § 1662(a)(1) (1982). *Id.* at 1323-25 (*McKelvey* Cert. Pet. 41a-46a).

The VA sought review in the United States Court of Appeals for the District of Columbia Circuit. The D.C. Circuit noted that the VA initially had not contested the district court's finding of jurisdiction, and quoted from the VA's brief:

> McKelvey did not make a Rehabilitation Act claim before the Board of Veterans Appeals; and it is not clear that the Board would have had authority to consider such a claim had

> he made it. We do not read 38 U.S.C. § 211(a) to preclude judicial review of a point that the Veterans Administration never considered and, under existing regulations, probably had no authority to consider.

729 F.2d at 198 (*McKelvey* Cert. Pet. 7a).

At oral argument, the court invited the parties to address, among other things, whether the VA had authority to consider the Rehabilitation Act claim. In response, the VA submitted a letter from its General Counsel announcing for the first time the VA's official conclusion that the Rehabilitation Act does not invalidate the conclusive presumption of the willful misconduct regulation that "primary" alcoholism is in all cases willful misconduct. 792 F.2d at 198-199 (*McKelvey* Cert. Pet. 7a). The VA then asserted that the General Counsel's letter was a decision of the Administrator, which, having been made in the course of a benefits determination, was insulated from review under § 211(a). *Id.* (*McKelvey* Cert. Pet. 7a-8a).

The D.C. Circuit rejected the VA's belated reversal of position:

> [T]hroughout this two and one-half year judicial proceeding, the VA now argues, it has held a trump card up its sleeve: even after the parties and two courts have expended the resources necessary for full and fair litigation, the VA, simply by releasing an official pronouncement on the matter *sub judice*, can preempt the judicial process, and convert the District Court's judgment into a declaration that merely advises, but does not control the agency.

> We are confident that Congress never envisioned such a gambit when it provided that veterans benefits claims should start and finish at the administrative level without coming to court at all. Section 211(a)'s application is to be determined firmly and finally as of the date that plaintiff commences litigation. . . .

792 F.2d at 199 (*McKelvey* Cert. Pet. 8a-9a). The D.C. Circuit therefore concluded that it had jurisdiction over this case because the VA had "left a potentially dispositive question undecided." *Id.*[2]

On the merits of the Rehabilitation Act claim, Judges Starr and Scalia concluded that the willful misconduct regulation did not violate § 504 of the Rehabilitation Act. 792 F.2d at 199-203 (*McKelvey* Cert. Pet. 9a-16a). Judge Ginsburg dissented. *Id.* at 203-09 (*McKelvey* Cert. Pet. 17a-29a).

The majority reasoned that the willful misconduct regulation merely regulates the distribution of benefits on the basis of conduct. It held that the VA had reasonably defined alcoholism as a "willfully caused handicap," *id.* at 200 (*McKelvey* Cert. Pet. 11a), and stated that it was "initially the VA's responsibility, and not ours, to determine what is 'willful misconduct.' " *Id.* at 201 (*McKelvey* Cert. Pet. 13a). The majority concluded that the willful misconduct regulation "is a permissible means of discriminating among those suffering from alcoholism on the basis of their *conduct*." *Id.* (emphasis in original). In so holding, the

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[2] Judge Scalia dissented from the court's holding with respect to jurisdiction, but because the court assumed jurisdiction he addressed the merits of the Rehabilitation Act question. 792 F.2d at 209 (*McKelvey* Cert. Pet. 30a).

majority explicitly recognized that its decision conflicted with *Tinch v. Walters* 765 F.2d 599 (6th Cir. 1985), in which the Sixth Circuit, facing the identical issue, had held that the willful misconduct regulation violates § 504. 792 F.2d at 201 n.4 (*McKelvey* Cert. Pet. 13a n.4).

In dissent, Judge Ginsburg examined the requirements for relief under § 504, and concluded that Mr. McKelvey satisfied each of them. She noted initially that alcoholics are "handicapped" under the Act, that the veterans' educational assistance program is subject to § 504, and that Mr. McKelvey is "otherwise qualified" to participate in the VA's educational benefit program. 792 F.2d at 204 (*McKelvey* Cert. Pet. 18a-19a). She then demonstrated that the majority's conclusion was wrong, noting that although the VA had purported to define alcoholism to be willful misconduct, Congress has deemed it to be a handicap under the Rehabilitation Act. She thus concluded that the VA's regulation discriminated on the basis of handicap. She observed that "under the majority's analysis, the government can never discriminate on the basis of alcoholism unless it explicitly admits that it is discriminating against alcoholics solely because they are handicapped. This mode of analysis effectively nullifies Section 504 coverage of alcoholics." 792 F.2d at 205 (*McKelvey* Cert. Pet. 21a).

SUMMARY OF ARGUMENT

This brief addresses two questions. The principal question, raised in both cases, is whether the willful misconduct regulation discriminates against alcoholics in violation of § 504 of the Rehabilitation Act. The second question, raised only in *Traynor*, concerns a

jurisdictional issue: whether judicial review of the willful misconduct regulation is barred by 38 U.S.C. § 211(a) (1982), which explicitly bars only judicial review of certain VA decisions. With respect to the latter question, the D.C. Circuit in *McKelvey* concluded that the VA had never made a "decision" that might defeat jurisdiction, and therefore held that jurisdiction existed. 792 F.2d at 199 (*McKelvey* Cert. Pet. 8a-9a). In its brief in opposition to the petition for writ of certiorari, the VA did not challenge the D.C. Circuit's conclusion. Brief for Respondents in Opposition 12-13. Thus, regardless of how it resolves the jurisdictional issue, the merits of the Rehabilitation Act issue are squarely presented in *McKelvey*.

The principal issue before the Court is whether the willful misconduct regulation discriminates against the handicapped in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). This question should be answered in the affirmative, for several reasons.

First, the proper § 504 analysis clearly demonstrates that the regulation is discriminatory. Petitioners are "individuals with handicaps" who were denied benefits available under a federal program only because the VA's willful misconduct regulation defines their handicap—alcoholism—to be willful misconduct.

Second, the D.C. Circuit's decision in *McKelvey* would potentially remove all alcoholics from the protection of the Rehabilitation Act, a result clearly contrary to Congressional intent. The D.C. Circuit majority concluded that the VA had reasonably determined that alcoholism is a willfully caused disability, and therefore that the willful misconduct regulation discriminates against alcoholics not on the

basis of their alcoholism, but on the basis of their conduct. This conclusion impermissibly separates the physical act of drinking from the causative condition, alcoholism, and cannot serve as the basis for allowing discrimination against alcoholics, which is prohibited by the Rehabilitation Act.

In addition, the D.C. Circuit's decision conflicts with this Court's recent decision in *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987) . In *Arline*, the Court observed that the "basic purpose of § 504 . . . is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." *Id.* at 1129. The willful misconduct regulation was upheld by the D.C. Circuit majority in part because it reflects "general societal perceptions regarding personal responsibility."[3] These "societal perceptions," if they exist, conflict with the definition of alcoholism Congress adopted as federal law in the Rehabilitation Act, and therefore, under *Arline*, cannot stand.

The second issue before the Court is the jurisdictional one, which is squarely raised only by *Traynor*. Section 211(a) of the Veterans' Benefits Law, 38 U.S.C. § 211(a) (1982), deprives the federal courts of jurisdiction to review certain "decisions of the Administrator" under statutes affording veterans' benefits. But it does not deprive the federal courts of jurisdiction to review claims that such VA regulations violate other federal laws. Here, petitioners' challenges are based on the Rehabilitation Act of 1973, which, as amended in 1978, prohibits all government agencies, including the VA, from discriminating against any individual on the basis of handicap. Ju-

[3] 792 F.2d at 201 (*McKelvey* Cert. Pet. 12a).

dicial review in these circumstances is permitted because § 211(a) bars only challenges to decisions "*under [a] law* administered by the Veterans' Administration *providing benefits to veterans* . . . ." 38 U.S.C. § 211(a) (emphasis added). Petitioners' challenge arises under a statute that provides protection to the handicapped—not benefits to veterans—and calls for an interpretation of a body of law entirely separate from the Veterans' Benefits Law.

In addition, § 211(a) does not apply to petitioners' cases because there was no "decision of the Administrator" on the question of law raised by these challenges. Throughout the administrative proceedings below, the VA consistently refused to decide whether the willful misconduct regulation conflicts with § 504 of the Rehabilitation Act. The VA's position was that it was bound by the willful misconduct regulation, and could not consider its validity under other laws.

Nor can it be argued that VA regulations themselves are "decisions," and therefore immune from review. Neither the language of the statute itself, available evidence of contemporary Congressional intent, or subsequent Congressional actions provides any indication that Congress intended § 211(a) to bar review of generally-applicable regulations.

Finally, permitting judicial review of the regulation would promote the goals of the Rehabilitation Act without thwarting the purposes of § 211(a). Allowing petitioners' challenge to be heard would also comport with decisions of this Court which have established that judicial review is available where, as here, an agency has refused to rule on an important issue, or where an important and overriding issue is raised which is not within the agency's special expertise.

ARGUMENT

I. THE WILLFUL MISCONDUCT REGULATION VIOLATES § 504 OF THE REHABILITATION ACT

Nine federal judges have considered whether the willful misconduct regulation violates § 504 of the Rehabilitation Act. Seven of these judges have ruled that the willful misconduct regulation cannot stand.[4] Only the D.C. Circuit majority in *McKelvey* has disagreed.

The discussion below will demonstrate that the willful misconduct regulation manifestly violates § 504, and that the Rehabilitation Act analysis of the D.C. Circuit majority in *McKelvey* was flawed. Moreover, the recent decision of this Court in *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987), requires the reversal of the D.C. Circuit's decision.

A. The Willful Misconduct Regulation Clearly Violates § 504 Of The Rehabilitation Act

In determining whether § 504 has been violated, a court must determine (1) whether the plaintiff is an "individual with handicaps" under the Act; (2) whether he is "otherwise qualified" for the benefits from which he has been excluded; (3) whether he has been excluded "solely" because of his handicap; and (4) whether the program from which he has been

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[4] *See* McKelvey v. Walters, 596 F. Supp. 1317 (D.D.C. 1984), *rev'd sub nom.* McKelvey v. Turnage, 792 F.2d 194, 203 (D.C. Cir. 1987) (Ginsburg, J., dissenting) (*McKelvey* Cert. Pet. 1a-46a); *Traynor v. Walters*, 606 F. Supp. 391 (S.D.N.Y. 1985), *rev'd on other grounds*, 791 F.2d 226 (2d Cir. 1986) (*Traynor* Cert. Pet. 1a-82a); Tinch v. Walters, 573 F. Supp. 346 (E.D. Tenn. 1983), *aff'd*, 765 F.2d 599 (6th Cir. 1985).

excluded is subject to § 504.[5] *See McKelvey v. Turnage*, 792 F.2d at 204 (*McKelvey* Cert. Pet. 17a-18a); *see also School Board of Nassau County v. Arline*, 107 S. Ct. 1123, 1127, 1130-31 (1987) (examining meaning of "handicapped individual" and "otherwise qualified"). Applying this analysis, Judge Parker in *McKelvey* and Judge Cooper in *Traynor* correctly concluded that the willful misconduct regulation violates § 504 of the Rehabilitation Act. *Traynor*, 606 F. Supp. at 398-400 (*Traynor* Cert. Pet. 66a-79a); *McKelvey*, 596 F. Supp. at 1323-24 (*McKelvey* Cert. Pet. 43a-44a).

There is no dispute that alcoholism is a handicap under § 504. This is confirmed by the 1978 amendments to the Rehabilitation Act, which added a provision now codified at § 7(8)(B) of the Act, 29 U.S.C. § 706(8)(B) , removing alcoholics from the Act's coverage for employment purposes if their condition would preclude the safe performance of a particular job. The clear import of this language is that for other purposes, such as educational benefits, Congress intended alcoholics to enjoy the protections of the Rehabilitation Act. *See School Board of Nassau County v. Arline*, *supra*, 107 S. Ct. at 1130 n.14 . As a result, every judge who has considered the issue now before the Court has recognized that alcoholism is a handicap

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[5] These elements are derived from the plain language of § 504:

> No otherwise qualified individual with handicaps . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .

29 U.S.C. § 794 (1982).

under § 504. *See Traynor v. Walters*, 606 F. Supp. at 398-400 (*Traynor* Cert. Pet. 67a-74a); *McKelvey v. Walters*, 596 F. Supp. at 1323, *rev'd on other grounds sub nom. McKelvey v. Turnage*, 792 F.2d at 202 n.5, 204 (*McKelvey* Cert. Pet. 14a n.5, 18a, 43a); *Tinch v. Walters*, 573 F. Supp. 346, 348 (E.D. Tenn. 1983), *aff'd*, 765 F.2d 599, 602 (6th Cir. 1985).[6] The VA has never, throughout the course of this litigation, contested that petitioners are handicapped individuals under the Act.

Nor can it be disputed that petitioners are "otherwise qualified" individuals within the meaning of the Rehabilitation Act. *See* 606 F. Supp. at 400 (*Traynor* Cert. Pet. 74a-76a); 596 F. Supp. at 1323 (*McKelvey* Cert. Pet. 43a). As this Court has recently noted, the "basic factors to be considered in conducting [an inquiry into whether a person is otherwise qualified] are well established." *School Board of Nassau County v. Arline*, 107 S. Ct. at 1131. "An 'otherwise qualified' handicapped person is one who is able to meet all of a program's requirements in spite of his handicap." *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). "[W]ith regard to

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[6] The Attorney General of the United States has reviewed the legislative history of § 504 and concluded that alcoholics are handicapped individuals. 43 Op. Att'y Gen. 12 at 2 (April 12, 1977). Subsequently, the predecessor of the Department of Health and Human Services issued guidelines reflecting this conclusion, 43 Fed. Reg. 2137 (1978), and the VA adopted those guidelines by regulation. 38 C.F.R. § 18.403(j)(2)(i)(C) (1986) . Several other courts have recognized that alcoholics are handicapped under § 504. *See, e.g.*, Simpson v. Reynolds Metals Co., 629 F.2d 1226, 1231 n.8 (7th Cir. 1980); Whittiker v. Board of Higher Education, 461 F. Supp. 99, 106 n.7 (E.D. N.Y. 1978); Davis v. Bucher, 451 F. Supp. 791, 796-97 n.4 (E.D. Pa. 1978).

educational benefits, the term 'otherwise qualified' denotes one who 'meets the academic and technical [*i.e.*, non-academic] standards requisite to admission or participation' with respect to educational programs."[7] *Traynor*, 606 F. Supp. at 400 and n.5 (*Traynor* Cert. Pet. 75a-76a and n.5) (citing original HEW regulations coordinating federal agency enforcement of § 504 and 38 C.F.R. § 18.403(k) (1986) (VA regulations implementing § 504)). Here, the VA has not disputed that Mr. McKelvey and Mr. Traynor were able to pursue a course of study at the time they applied for extensions of their delimiting dates.

Both district courts correctly concluded that the willful misconduct regulation discriminated against petitioners solely on the basis of their handicap. 606 F. Supp. at 400 (*Traynor* Cert. Pet. 76a-77a); 596 F. Supp. at 1323 (*McKelvey* Cert. Pet. 43a). The Chairman of the Board of Veterans Appeals at Mr. McKelvey's hearing had stated: "As far as we are concerned at the Board of Veterans Appeals, we don't have discretion to say that primary alcoholism is a disease." J.A. 83. Judge Parker noted that by precluding the presentation of evidence "causally related to his handicap," the Board of Veterans Appeals had denied Mr. McKelvey any opportunity to overcome

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[7] In *Southeastern Community College v. Davis*, *supra*, the Court noted that regulations promulgated by the Department of Health, Education and Welfare to interpret § 504 state that a " '[q]ualified handicapped person' is, '[w]ith respect to secondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity.' " 442 U.S. at 406 (*quoting* 45 C.F.R. § 84.3(k)(3) (1978) (now administered by the Department of Health and Human Services)).

the presumption of willful misconduct. 596 F. Supp. at 1323 (*McKelvey* Cert. Pet. 43a). Judge Parker noted that other individuals, in contrast to alcoholics, are afforded an opportunity to demonstrate that they qualify for a delimiting date extension. *Id.*

Finally, there can be no question that the program from which petitioners were excluded is subject to § 504. Section 504 explicitly states that it covers "any program or activity receiving federal financial assistance or under any program or activity conducted by any executive agency." 29 U.S.C. § 794 (1982). The VA has not disputed that the Rehabilitation Act applies to the VA's educational benefits program. *Traynor*, 606 F. Supp. at 400 (*Traynor* Cert. Pet. 77a-78a).

The reasoning of both district courts and the five other judges who reached the same conclusion makes it clear beyond dispute that the willful misconduct regulation violates § 504 of the Rehabilitation Act. The D.C. Circuit majority in *McKelvey* reached a different result, and the next section will demonstrate that its reasoning was flawed and inconsistent with the decisions of this Court, and therefore should be reversed.

B. The Analysis Of The D.C. Circuit Was Incorrect, And Would Deprive All Alcoholics Of The Protections Of The Rehabilitation Act.

The decision of the D.C. Circuit majority in *McKelvey* rests on an improper analysis which negates the protections provided alcoholics under § 504 of the Rehabilitation Act of 1973. The majority concluded that the willful misconduct regulation simply categorizes a class of handicapped individuals on the basis of their conduct, and that discrimination on the basis

of conduct is permissible. 792 F.2d at 202 (*McKelvey* Cert. Pet. 14a). In reaching this conclusion, the majority noted that most medical experts recognize alcoholism to be a disease; a few do not. 792 F.2d at 200-01 (*McKelvey* Cert. Pet. 11a). *See* J.A. 34, 39-41 (Affidavit of Anne Geller); J.A. 56, 61-63 (Affidavit of Sheldon Zimberg). The majority observed that this absence of unanimity showed that the "agency's position [that alcoholism is willful misconduct] has the necessary minimal support" to make it reasonable, but also concluded that medical judgment was unnecessary, because the "application of general societal perceptions regarding personal responsibility" supports the willful misconduct regulation. 792 F.2d at 201 (*McKelvey* Cert. Pet. 11a-12a).[8] In the majority's view, such "general societal perceptions" make the "agency's conclusion . . . a reasonable one" that is "within the bounds of reasonable interpretation of the statute [permitting delimiting date extensions]."[9] The majority therefore concluded that the VA's discrimination was based on conduct, not a handicap, and so was permissible.

The majority's conclusion is in error, for the "conduct" relied upon by the majority, presumably drinking, cannot be meaningfully distinguished from the handicap of alcoholism. As Judge Ginsburg noted in her dissent, the majority's view would preclude any challenge to discrimination based on alcoholism, because such discrimination could always be "justified"

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[8] This Court's decision in *Arline* establishes that such "perceptions," if they in fact exist, are not a legally-permissible basis for discrimination against the handicapped. *See* pp. 28-30 *infra*.

[9] 38 U.S.C. § 1662(a)(1) (1982), quoted at pp. 4-5 *supra*.

as based on conduct. 792 F.2d at 225 (*McKelvey* Cert. Pet. 21a). Yet Congress, the Attorney General, and numerous courts have determined that alcoholism is a handicap protected from discrimination by § 504 of the Rehabilitation Act.[10] By focusing on the physical act of taking a drink, the majority would allow the VA to ignore the causative disabling condition, alcoholism. The majority thus completely undermines the statutory protections afforded alcoholics by permitting the VA by regulation to classify alcoholism as conduct.[11] Section 504 prohibits limitation of eligibility for federal programs because of an individual's handicap, but through the willful misconduct regula-

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[10] *See* pp. 20-21 *supra*.

[11] The willful misconduct regulation conflicts not only with the Rehabilitation Act, but also with other VA regulations. For example, the VA's regulations implementing the Rehabilitation Act for organizations receiving VA assistance define alcoholism as a handicap, 38 C.F.R. § 18.403(j)(2)(i)(C) (1986), and prohibit recipients of VA assistance from denying "a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service that is equal to that afforded others." 38 C.F.R. § 18.404(b)(1)(i) (1986).

Aside from this obvious inconsistency, the willful misconduct regulation does not even comport with the VA's more general regulations defining willful misconduct. Thus, VA regulations define "willful misconduct" as "an act involving conscious wrongdoing or known prohibited action," which "involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 38 C.F.R. § 3.1(n) (1986). *See* pp. 5-6 *supra*. VA regulations specifically recognize that the willful misconduct regulation is inconsistent with the more general definition of willful misconduct. 38 C.F.R. § 3.301(c) (1986) (the more general definition is "modified" by the willful misconduct regulation).

tion, the VA achieves just such a result. The regulation accordingly cannot stand.[12]

The D.C. Circuit attempted to justify the willful misconduct regulation by asserting that it "affects merely the exclusion of . . . a specific class of handicapped persons from a program limited by federal statute . . . to a different class of handicapped persons" because it applies not to the educational benefits program in its entirety, but only to the educational benefits program after ten years has elapsed.[13] 792 F.2d at 201 n.3 (*McKelvey* Cert. Pet. 12a-13a n.3). In response to this argument, Judge Ginsburg observed that:

> the notion that the educational benefits program somehow becomes a new and different program after ten years defies common sense and common use of the term 'program.' Moreover, like the majority's argument that discrimination against alcoholics is appropriately characterized as discrimination on the basis of conduct, the majority's inclination

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[12] By invalidating the willful misconduct regulation, the Court would leave untouched the statutory provision permitting delimiting date extensions. In *Traynor*, Judge Cooper noted that "there is no conflict between the two statutes, *i.e.*, the willful misconduct statute, 38 U.S.C. § 1662(a)(1) , and § 504 of the Rehabilitation Act, 29 U.S.C. § 794." 606 F. Supp. at 401 (*Traynor* Cert. Pet. 80a).

[13] This exclusion is achieved not by federal statute or executive order, but impermissibly by regulation. *See* 28 C.F.R. § 41.51(c) (1986) ("The exclusion of a specific class of handicapped persons from a program limited by federal statute or executive order to a different class of handicapped persons is not prohibited by [the Rehabilitation Act]).

> narrowly to define "program" ultimately will enfeeble the concept discrimination. If the VA may explain every act of discrimination against alcoholics in favor of other handicapped persons as simply the exclusion of alcoholics from a narrowly-defined program, discrimination against alcoholics can never occur in any program for the handicapped.

792 F.2d at 209 (*McKelvey* Cert. Pet. 28a).

Judge Ginsburg's analysis demonstrates a major flaw in the opinion of the majority below: its reasoning is potentially limitless. Any agency could seek to define programs in such a way that alcoholism in a specific context could be called conduct, thereby permitting the agency to discriminate on the basis of alcoholism.[14] While the majority below would prefer

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[14] For example, in *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) , the court invalidated under § 504 regulations that enabled the city of Philadelphia to refuse to hire recovered alcoholics or drug abusers for city jobs, including jobs supported by the Comprehensive Employment and Training Act (CETA), 29 U.S.C. § 841 *et seq.* (1982) (repealed 1982) . But the decision below would permit a program sponsor to adopt regulations calling alcoholism "conduct," and thus discriminate against alcoholics on that basis.

The problem is not insignificant. There are millions of alcoholics in the United States today. A report by the National Research Council estimated that in the years 1971-1976, 1.2% of the adult population, nearly 3 million people, consumed more than 5 ounces of alcohol daily. National Research Council, Alcohol and Public Policy: Beyond the Shadow of Prohibition, p. 28, National Academy Press (1981). *See* J.A. 56, 63 ¶ 10 (Affidavit of Sheldon Zimberg). The protections afforded alcoholics by the Rehabilitation Act have a positive impact on the lives of many people, and should not be destroyed by the strange judicial construction of the majority below.

to call alcoholism conduct, Congress has concluded that alcoholism is a handicap under the Rehabilitation Act. The regulation upheld by the decision below effectively nullifies the decision of Congress, and therefore cannot stand.

C. The D.C. Circuit's Decision Conflicts With This Court's Decision in *School Board of Nassau County v. Arline*

The decision of the D.C. Circuit majority in *McKelvey* conflicts with the decision of this Court in *School Board of Nassau County v. Arline*, 107 S. Ct. 1123 (1987). In *Arline*, the Court held that persons with contagious diseases were handicapped within the meaning of the Rehabilitation Act, and remanded the case to the district court for an inquiry into whether the petitioner was "otherwise qualified" for the position she sought. The Court noted that the "basic purpose of § 504 . . . is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." *Id.* at 1129.

Here, the willful misconduct regulation is supported only by prejudice and ignorance. As the brief *amicus curiae* of the American Medical Association and American Psychiatric Association demonstrates, there is widespread agreement in the medical community that alcoholism is a medical condition requiring treatment, not condemnation. Such was not always the case, and particularly so when the VA first announced in 1931 that alcoholism would be defined as willful misconduct. J.A. 133.[15] Since that time, when Pro-

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[15] The willful misconduct regulation does not explicitly state that "alcoholism is willful misconduct," though the VA has consistently interpreted it in that fashion. *See* J.A. 112-13. Thus,

hibition was the law of the land, the VA policy has been maintained with only slight modifications. J.A. 138.[16]

The sweeping classification of alcoholism as willful misconduct may have reflected the views of an earlier era, but advancements in medical understanding of alcoholism have shown that view to be wrong. Yet it

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the 1931 Administrator's decision that led to the current regulation states:

> The main principle involved is that the simple drinking of any alcoholic beverage, whether jamaica ginger, whisky or other liquor, is not in and of itself willful misconduct. However, in the event other circumstances exist in a given case, such as deliberate drinking where the drink was known to be poisonous, or under conditions which would raise a presumption to that effect, the element of willful misconduct immediately assumes proportions. Further, if in the drinking of any beverage for the purpose of enjoying its intoxicating effects, excessive indulgence leads to disability, willful misconduct would undoubtedly inhere in the act.

J.A. 135-136. This language could reasonably be read to define as willful misconduct a disability resulting from a car wreck during a night out "drinking with the boys," but the concept that alcoholics drink "for the purpose of enjoying its intoxicating effects" can endure only because of a smug, prejudiced attitude of those without the problem toward those who suffer from alcoholism.

[16] One modification is the distinction between primary and secondary alcoholism. Primary alcoholism is alcoholism not caused by an underlying psychiatric condition, while secondary alcoholism stems from a psychiatric condition. While these terms may have some medical significance, as used by the VA they primarily distinguish alcoholism which will be treated conclusively as willful misconduct (primary alcoholism) from that which will not (secondary alcoholism). *See McKelvey*, 792 F.2d at 202 (*McKelvey* Cert. Pet. 13a-14a).

is just that view, which is supported by what the majority characterizes as "general societal perceptions regarding personal responsibility," that the majority cites as adequate support for the VA's willful misconduct regulation. *See* pp. 23-24 *supra*. As the Court recognized in *Arline*, Congress' passage of the Rehabilitation Act, an enlightened measure intended to ensure that handicapped citizens receive opportunities available to others, repudiated such prejudiced attitudes as the basis for discrimination in public programs. 107 S.Ct at 1129.

Arline also undermines the D.C. Circuit majority's conclusion that the discrimination against petitioners was based on conduct, rather than their handicap, and was therefore permissible. In *Arline*, the Court refused to distinguish between the contagious effects of a disease and the disease's physical effects on its victims. 107 S.Ct. at 1128. Yet here the VA makes an analogous distinction between the physical activity that leads to intoxication, and the underlying condition of alcoholism which caused petitioners to drink. *Arline* indicates that such a distinction is not meaningful and cannot justify discrimination against handicapped individuals.

Arline confirms that the coverage of the Rehabilitation Act is broad, and that its protection extends to all persons "otherwise qualified" for the benefits they seek. 107 S. Ct. at 1130-32. Here, both district judges found that the petitioners were "otherwise qualified." Therefore, the only impediment that prevents them from obtaining benefits on a nondiscriminatory basis is the VA's willful misconduct regulation. *Arline* indicates that this regulation cannot stand.

II. SECTION 211(a) DOES NOT PRECLUDE THE FEDERAL COURTS FROM DETERMINING WHETHER THE VA'S WILLFUL MISCONDUCT REGULATION VIOLATES § 504 OF THE REHABILITATION ACT.

A. Since There Was No "Decision Of The Administrator" On The Question Of Law Presented In These Cases, § 211(a) Does Not Preclude Judicial Review

Section 211(a) of the Veterans' Benefits Law provides in pertinent part:

> the *decisions* of the Administrator on any question of law or fact *under* any law administered by the Veterans' Administration providing benefits for veterans . . . shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C. § 211(a) (1982) (emphasis added). Section 211(a) does not bar judicial review of all acts or failures to act by the VA. Rather, by its plain language, § 211 (a) applies only to "*decisions* of the Administrator."[17] Thus, at an absolute minimum, a "decision" on the question the courts are asked to review must have been made by the Administrator. The VA has agreed with this fundamental point.[18]

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[17] "Decisions of the Administrator" include decisions of the Board of Veterans' Appeals. *Traynor*, 791 F.2d at 233 (Kearse, J., dissenting) (citing 38 U.S.C. §§ 4004(a) and (b) (1982)) (*Traynor* Cert. Pet. 36a).

[18] The VA told the D.C. Circuit that "the language of section 211(a) does require that there be a decision at *some* level of the agency on the question of law or fact as to which preclusion of

In Mr. Traynor's case, the VA expressly declined to decide whether the willful misconduct regulation violates the Rehabilitation Act. The Board of Veterans' Appeals stated explicitly that the VA was not the proper forum for entertaining either constitutional or federal statutory challenges to the regulation: "[y]ou're asking us . . . to judge the regulations, to act as a court . . . . [W]e're incompetent in that jurisdiction." 791 F.2d at 233 (*Traynor* Cert. Pet. 35a-36a). In its final decision upon reconsideration, the Board indicated that it considered such challenges "beyond [its] power to decide." (*Traynor* Cert. Pet. 116a).[19]

In Mr. McKelvey's case, the VA initially disclaimed authority to decide whether the willful misconduct regulation violated the Rehabilitation Act. The VA stated in its brief to the D.C. Circuit:

> We are not pursuing the question of jurisdiction on this appeal, because we do not believe that 38 U.S.C. § 211(a) can be applied to the claim under the Rehabilitation Act . . . . We do not read 38 U.S.C. § 211(a) to preclude judicial review of a point that the Veterans Administration never considered

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review is sought." Supplemental Brief for Appellants at 3, *McKelvey v. Turnage* (R. 12/20/85).

[19] In light of these repeated disclaimers, the Second Circuit majority obviously erred in stating that the VA "has never disclaimed its authority to determine whether its own regulations comply with federal statutes" and assuming that the Board of Veterans' Appeals had in fact applied the "regulation . . . in light of the Rehabilitation Act." 791 F.2d at 229 (*Traynor* Cert. Pet. 13a, 15a). *See id.* at 233 (Kearse, J., dissenting) (*Traynor* Cert. Pet. 34a-35a).

> and, under existing regulations, probably had no authority to consider.

Brief for Appellant at 9-10 n.1 (R. 3/20/85), quoted in part at 792 F.2d 198 (*McKelvey* Cert. Pet. 7a).[20]

Despite the fact that the VA explicitly declined to decide the Rehabilitation Act issue in either case, both the majority in *Traynor*[21] and Judge Scalia in dissent in *McKelvey* concluded that because both petitioners were denied benefits, a "decision" had been reached and, in reaching that "decision," the VA had "necessarily decided" the Rehabilitation Act issue in denying those benefits. *McKelvey*, 792 F.2d at 209-210 (Scalia, J., dissenting in part) (*McKelvey* Cert. Pet. 30a). The discussion above demonstrates that these conclusions were clearly erroneous. Because there was no "decision" concerning the validity of the willful misconduct regulation under the Rehabilitation Act, § 211(a) does not prevent the federal courts from considering petitioners' challenges to the regulation.

B. Section 211(a) Does Not Bar Challenges To VA Regulations Under the Rehabilitation Act

Arguments seeking to limit access to the courts to challenge agency regulations must be viewed suspiciously. This Court has long honored the "strong pre-

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[20] The VA later submitted a letter from its General Counsel stating that the willful misconduct regulation comported with § 504. *See* p. 13 *supra*. However this letter is characterized, it surely was not a "decision of the Administrator" for purposes of § 211(a). The D.C. Circuit declined to recognize it as such and properly assumed jurisdiction. 792 F.2d 199 (*McKelvey* Cert. Pet. 8a). As noted above, the VA has not challenged the D.C. Circuit's assumption of jurisdiction. *See* p. 16 *supra*.

[21] *See* p. 9 *supra*.

sumption" "that Congress intends judicial review of administrative action." *Bowen v. Michigan Academy of Family Physicians*, 106 S.Ct 2133, 2135 (1986). In these cases, that presumption may be overcome only if there is "persuasive reason to believe" that Congress intended to preclude review of the validity of regulations of broad application when it enacted § 211(a). *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967) (citing cases); *Bowen, supra*, 106 S.Ct. 2136. "The heavy burden of overcoming this presumption rests on those who seek to insulate their actions from such scrutiny." *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975). At a minimum, this Court demands "reliable indicators" of Congressional intent before overturning the presumption favoring judicial review:

> [The question whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved.

Block v. Community Nutrition Institute, 467 U.S. 340, 345 (1984). An examination of each of these factors in this case supports only one conclusion: Congress did not intend to prohibit a federal court challenge to the validity of the willful misconduct regulation under § 504 of the Rehabilitation Act.

1. The Express Language Of § 211(a) Does Not Prohibit A Challenge Under The Rehabilitation Act To A VA Regulation of Broad Application.

Section 211(a) precludes review only of

> "decisions of the Administrator . . . . under any law administered by the Veterans' Administration providing benefits to veterans . . .."

Section 504 of the Rehabilitation Act is not "a law . . . [that] provid[es] benefits for veterans." Rather, it is a civil rights statute that gives protection to individuals with handicaps. Nor is the Rehabilitation Act a "law administered by the Veterans' Administration." The President has designated two other federal agencies—first the Department of Health, Education and Welfare, and then the Department of Justice—as the agencies responsible for setting the standards and coordinating the implementation and enforcement of § 504.[22] *See School Board of Nassau County v. Arline*, *supra*, 107 S.Ct. at 1127. Although the VA must comply with the Rehabilitation Act, just as it must comply with the Constitution, it no more "administers" the Act than it "administers" the Constitution. *See Traynor*, 791 F.2d at 232-33 (Kearse, J., dissenting) (*Traynor* Cert. Pet. 32a-33a).[23]

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[22] In 1976, the President designated HEW as the agency responsible for setting government-wide standards for implementing § 504 and for coordinating its implementation. *See* Exec. Order No. 11,914, 3 C.F.R. 117 (1977) . In 1980, that Executive Order was replaced by Exec. Order No. 12,250, 3 C.F.R. 298 (1981), which transferred the authority for coordinating and enforcing § 504 to the Department of Justice.

[23] The dissent in *Traynor* noted that the majority "confuses administration with compliance" in regard to the VA's responsibilities under the Rehabilitation Act. 791 F.2d at 232-33 (*Traynor* Cert. Pet. 32a-33a). That confusion would permit the VA or other agencies willfully to ignore or violate an important federal law, refuse to hear an appeal of its failure to follow the law, and then insulate that defiance by denying court access to

For these reasons, by its plain language § 211(a) does not bar judicial consideration of petitioners' challenges to the willful misconduct regulation. This is confirmed by this Court's decision in *Johnson v. Robison*, 415 U.S. 361 (1974). In *Johnson*, the Court made clear that only a narrow category of "decisions" falls within § 211(a)'s prohibition against judicial review: those "made by the Administrator in the . . . application of a particular provision of the [veterans' benefits] statute to a particular set of facts." 415 U.S. at 367.[24]

A determination by the VA about the validity of the willful misconduct regulation would not be a "decision" within the meaning of § 211(a) because it requires a legal determination under the Rehabilitation Act, rather than under the Veterans' Benefit Law. It also does not require a decision concerning a "particular set of facts." Rather it involves a challenge to a regulation that conclusively determines the outcome of an entire class of veterans' benefit claims by prohibiting any individualized application of the Veterans' Benefits Law to the facts underlying such claims. Only an interpretation of § 211(a) that permits judicial scrutiny of VA regulations whose validity is challenged under statutes which do not pertain to

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those the law was designed to protect. Such a result violates fundamental principles of fairness.

[24] In *Johnson*, this Court noted that its reading of § 211(a)'s scope was "supported by the administrative practice of the Veterans' Administration", in administrative appeals identical to those of the petitioners in this case, of "expressly disclaim[ing] authority to decide constitutional questions". 415 U.S. at 367-68. Similarly, the VA consistently has disclaimed authority to decide federal statutory challenges to the validity of its regulations.

veterans' benefits fairly takes into account the full text of § 211(a) and *Johnson's* interpretation of it.

2. "Decisions" And "Regulations" Have Separate And Distinct Meanings In § 211(a) And In The Statutory Scheme Of The Veterans' Benefits Law.

A challenge to a VA regulation is not a challenge to a "decision of the Administrator," and therefore is not barred by § 211(a). The terms "decisions" and "regulations" are not defined under the Veterans' Benefit Law, but those terms have always been used distinctively in that law and are intended to mean different things.

The predecessor of § 211(a) is found at § 5 of the Economy Act of 1933, Pub. L. No. 73-2, § 5, 48 Stat. 8 (1933). As originally enacted, § 5 provided:

> All decisions rendered by the Administrator of Veterans' Affairs under the provisions of [Title I of the Economy Act], or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.

48 Stat. 9. The Economy Act delegated to the President the authority to promulgate regulations setting veterans' pensions.[25] It then immunized from judicial review only those decisions of the Administrator that applied the statute *and* regulations to the unique facts

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[25] Title I authorized the President, not the VA, to issue these regulations. Congress did not use "regulations" and "decisions" synonymously. *See* §§ 3, 4, 7-9, 48 Stat. 8, 9-10 (1933).

of each individual veteran's claim. *See* §§ 3-4 of the Economy Act, 48 Stat. 9-10 (1933); *see also* n.27 *infra*.

In the various versions of the preclusion-of-review provision enacted since 1933, Congress has never altered the original and distinctive meanings of the words "decisions" and "regulations." Indeed, Congress' intent to maintain its original distinction between "decisions" and "regulations" is clear from another key provision of the Veterans' Benefits Law whose precursors date back to 1933.[26]

Section 4004 of the Veterans' Benefits Law defines the jurisdiction of the Board of Veterans' Appeals, the body which actually makes the "decision of the Administrator" in all veterans' appeals. It provides in relevant part:

> (a) All questions on claims involving benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the Board.
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> * * *
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> (c) The Board *shall be bound in its decisions by the regulations of the Veterans' Administration*, instructions of the Admin-

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[26] Congress' retention of the same language in earlier and later versions of a statute provides strong evidence of its intent to retain the original meaning of that language. Bell v. New Jersey, 461 U.S. 773, 784 (1983). Similarly, words used with the same meaning in related provisions of a single statute are a useful guide to statutory construction. Bob Jones University v. United States, 461 U.S. 574, 587 & n.10 (1983).

> istrator, and the precedent opinions of the chief law officer.

38 U.S.C. § 4004(a), (c) (1982) (emphasis supplied). Thus § 4004 distinguishes between "decisions" in individual cases and "regulations" or other rules of broad application by which the Board is bound in reaching its decisions. Only the former types of determinations constitute "decisions of the Administrator" that are immunized from review under § 211(a).

3. The Legislative History Of § 211(a) And Its Predecessors Confirms That Congress Intended To Preclude Judicial Review Only Of Individual Benefits Determinations And Not Of Regulations

Since Congress enacted the first version of § 211(a) in 1933, it has consistently made clear its unwavering intention to immunize from judicial review only decisions applying the veterans' benefits laws and regulations to the particular facts of each veteran's case. It is equally clear that Congress did not intend to immunize from judicial scrutiny VA regulations such as the one challenged here.

The legislative history of the first version of § 211(a), § 5 of the Economy Act of 1933, is almost non-existent. *Johnson v. Robison*, *supra*, 415 U.S. at 369. The history does, however, confirm that Congress focused on barring review of decisions about individual veterans' claims that the Administrator rendered when "acting under [the] regulations and rates" established by the President.[27] In the various

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[27] 77 Cong. Rec. 254 (1933) (remarks of Sen. Harrison) ("Section 5 gives to the Administrator only such power as the Administrator now has. The only purpose of this section is that, after the President has announced the regulations [establishing

versions of the statute enacted between 1933 and 1970, when Congress last amended the preclusion section, that focus never shifted.[28]

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pension requirements and rates] . . . ., acting under those regulations and rates, whatever decision the Administrator shall make shall be final.").

[28] In 1940, the Congress added a new section to the former Pension, Bonuses and Relief Act, part of which concerned veterans' pensions. § 11, 54 Stat. 1197 (1940). This amendment, which was later consolidated with § 5 of the Economy Act to become the preclusion-of-review provision for purposes of the veterans' law, was, in the words of the VA, "similar to that contained in Section 5, Public L. No. 2, Seventy-third Congress." 86 Cong. Rec. 13,490 (1940); its only purpose was to bring uniformity to the various veterans' laws. *See, e.g.*, 86 Cong. Rec. 13,490 (remarks of Mr. Rankin), 86 Cong. Rec. 13,491 (remarks of Mrs. Rogers).

In 1957, the Congress, in consolidating the veterans' benefit laws, also consolidated the former preclusion-of-review provisions in one section. § 211, Veterans' Benefit Law of 1957, 71 Stat. 83, 92 (1957). As the Court noted in *Johnson, supra*, 415 U.S. at 369 n.10, the legislative history of the amendment is not instructive. Nothing, however, indicated that Congress intended to expand the scope of the preclusion section. *See* H.R. Rep. No. 279, 85th Cong., 1st Sess. 1 (1957); S. Rep. No. 332, 85th Cong. 1st Sess. 1 (1957).

The last amendment to the veterans' preclusion-of-review clause, and the current version of § 211(a), was enacted in response to a series of cases decided by the D.C. Circuit. Those cases had limited the scope of the section to initial claims for benefits, but held that suits challenging the propriety of benefit terminations were not barred. Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967); Thompson v. Gleason, 317 F.2d 901 (D.C. Cir. 1962); Wellman v. Whittier, 259 F.2d 163 (D.C. Cir. 1958). Congress changed § 211(a) in 1970 to its present form expressly to reject the "fairly tortured construction adopted by the court of appeals in the *Wellman*, *Thompson*, and *Tracy* holdings," H.R.

In fact, Congress has reconsidered the preclusion section on a number of occasions in recent years. The record of those deliberations reveals that, in declining to expand its scope, Congress understood not only that an increasing number of federal courts of appeals had found § 211(a) not to bar review of regulations challenged on constitutional or statutory grounds, but also that the VA had represented consistently that § 211(a) does not preclude such review.[29] This Court has held repeatedly that Congressional awareness of the consistent administrative practice of the agency charged with administering a statute is a significant source for understanding Congressional intent. *See, e.g., Bell v. New Jersey*, 461 U.S. 773, 787 (1983); *Andrus v. Shell Oil Company*, 446 U.S. 657, 666 n.8, 667-672 (1980).

Rep. No. 1166, 91st Cong., 2d Sess. 11 (1970), *reprinted in* [1970] U.S. Code Cong. & Ad. News p. 3723, 3730-31; and to "preserve [§ 211(a)'s] two [original and] primary purposes," *Johnson, supra*, 415 U.S. at 371. *See* pp. 45-46 *infra*. The authors and sponsors of the 1970 amendment explained its purpose solely in terms of restoring uniformity to the "decisions in individual cases," 116 Cong. Rec. 26,489-90 (daily ed., July 30, 1970) (remarks of Mr. Teague, Chairman of the House Comm. on Veterans' Affairs). *See also* 116 Cong. Rec. 19,733-35 (daily ed., June 16, 1970) (remarks of Mr. Teague).

[29] *See, e.g.*, Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearings on S.349 Before the Senate Committee on Veterans' Affairs, 97 Cong., 1st Sess. 130, 131 (1981) (Statement of VA Acting General Counsel Robert Coy); Judicial Review of Veterans' Claims: Hearings Before the Subcommittee on Special Investigations of the House Committee on Veterans' Affairs, 96th Cong., 2d Sess. 84 (1980) (Statement of VA General Counsel Guy McMichael); *see also* pp. 42-45 *infra*.

Congress was advised as early as 1952 of the VA's position that the precursor of § 211(a) was designed only to bar review of individual fact-bound claims.

> In the adjudication of compensation and pension claims a wide variety of medical, legal, and other technical questions constantly arise which require the study of expert examiners of considerable training and experience, and which are not readily susceptible of judicial standardization. Among other questions to be determined in the adjudication of such claims are those involving length and character of service, origin of disabilities, complex rating schedules, a multiplicity of medical and physical phenomena for consideration intercurrently with such schedules, and the application of established norms to the peculiarities of the particular case. These matters have not been considered by the Congress or the courts appropriate for judicial determination but have been regarded as apt subjects for the purely administrative procedure.

Hearings on H.R. 360, 478, 2442 and 6777 Before a Subcommittee of the House Committee on Veterans' Affairs, 82nd Cong., 2d Sess., 1962-63 (1952) (discussed in *Johnson v. Robison*, 415 U.S. 361, 371 & n.12 (1974)).

More recently—in 1982 and again in 1984, when Congress considered legislation that ultimately resulted in the Veterans' Dioxin and Radiation Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984)—the VA's consistent position on the scope

of § 211(a) influenced Congress not to amend that section.[30] In an exchange of letters with Senator Cranston of the Senate Committee on Veterans' Affairs, Robert P. Nimmo, then VA Administrator, explained the VA's position regarding the meaning and scope of § 211(a) as follows:

> I continue to believe, as I stated in a written response to your question at my confirmation hearing, that VA regulations should be, and are, reviewable in the Federal courts. This principle was further explained by the Acting General Counsel last summer, when he indicated to the Committee that "legislation, regulations, and procedures" are judicially reviewable, as are "substantive Agency actions of broad, binding application."
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> Section 211(a) has been properly limited by the courts so that *it does not protect every decision, policy, or action of the VA from*

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[30] While post-enactment Congressional action or inaction must be treated cautiously in determining the intention of a previous Congress, *e.g.*, Universities Research Ass'n v. Coutu, 450 U.S. 754, 778 (1981), post-enactment statements may indicate how key members of Congress interpret particular provisions of a statute. *See e.g.*, Grove City College v. Bell, 465 U.S. 555 (1984); Bell v. New Jersey, 461 U.S. 773, 784-87 (1983); Andrus v. Shell Oil Co., 446 U.S. 657, 668-72 (1980). In addition, this Court has recognized the significance of evidence that Congress has reconsidered statutory provisions, but chosen not to alter them because it was aware of, agreed with, and relied upon prevailing interpretations of those laws by courts or the federal agencies charged with their administration. *See, e.g.*, Lindahl v. Office of Personnel Management, 470 U.S. 768, 782 n.15 (1985); Bob Jones University v. United States, 461 U.S. 574, 606-608 (1983) (Powell, concurring in part).

> *judicial scrutiny*. Those Agency rules and procedures of broad and binding application which affect the *rights of a number of claimants to VA benefits are not protected by section 211(a)*. The way the VA processes and decides an individual benefit claim is clearly beyond the reach of the Federal courts, however
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> . . . .
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> Section 211(a) will not be raised by the Veterans Administration, nor by Department of Justice at our recommendation, when there is either a clear challenge to the constitutionality of a statute, regulation or procedure or *an allegation that a regulation or procedure is inconsistent with law*. This is the general policy you cite in your letter, which was enunciated by the Acting General Counsel in his written response following the hearing of July 15, 1981, on S.349.

Letter from Robert P. Nimmo to Senator Alan Cranston, March 24, 1984 (*reprinted in full* at 130 Cong. Rec. S6160 (daily ed. May 22, 1984) (emphasis supplied).

Moreover, during the floor debate about the Veterans' Dioxin Act, several Senators on the Veterans' Affairs Committee stated that it was understood among the Conference Committee negotiators that § 211(a) permitted judicial review of regulations promulgated by the Administrator. *See, e.g.*, 130 Cong. Rec. S13,591, S13,598 (daily ed. Oct. 4, 1984) (remarks of Sen. Cranston); *id.* at S13,608 (remarks of

Sen. Spector); *id.* at S13,610 (remarks of Sen. Mitchell).

Even more recently, the VA reaffirmed that position:

> "[T]he VA regards its regulations and substantive agency actions of broad application to be subject to judicial review. Accordingly, there are many instances in which § 211(a) of Title 38 United States Code, does not preclude judicial review, at least with respect to these questions of law."

H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the Committee on Veterans' Affairs, House of Representatives, 99th Cong., 2d Sess., Vol. II, 328 (1986).

Thus, the legislative history of § 211(a) and its predecessors and the position of the VA itself clearly and consistently support the conclusion that § 211(a) does not prohibit judicial scrutiny of the VA's willful misconduct regulations.

C. Permitting Review of Challenges To VA Regulations Will Not Impose Burdensome And Technical Litigation Upon The Courts, And Will Further The Goals Of The Rehabilitation Act.

1. Allowing Review Will Not Thwart The Purposes Of § 211(a).

In *Johnson v. Robison*, this Court concluded that Congress intended § 211(a) to serve two primary purposes:

> (1) to insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation, and

> (2) to insure that the technical and complex determinations and applications of Veterans' Administration policy connected with veterans' benefits decisions will be adequately and uniformly made.

415 U.S. at 369, 370 (footnotes omitted). Permitting judicial review of a challenge under the Rehabilitation Act to the willful misconduct regulation is consistent with these objectives.

Four circuit courts have concluded that § 211(a) does not bar review of statutory and constitutional challenges to VA regulations. Those courts uniformly have found that the policies underlying § 211(a) would not be impaired by permitting review,[31] and the experience in each circuit has borne this out. Few lawsuits challenging VA regulations have been filed,[32] and

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[31] *See* Evergreen State College v. Cleland, 621 F.2d 1002 (9th Cir. 1980); University of Maryland v. Cleland, 621 F.2d 98 (4th Cir. 1980); Merged Area X (Education) v. Cleland, 604 F.2d 1075 (8th Cir. 1979); and Wayne State University v. Cleland, 580 F.2d 627 (6th Cir. 1978). The Second Circuit attempted to distinguish these cases on the ground that they were brought by "educational institutions interested in the overall administration of the VA educational benefits program," rather than individual veterans. 791 F.2d 230 (*Traynor* Cert. Pet. 18a-19a). This distinction is factually incorrect, for individual veterans were among the plaintiffs in *Wayne State*, 590 F.2d at 628 n.1 , and in *Merged Area X (Education)*, 604 F.2d at 1077. It also ignores the fact that the ultimate beneficiaries of suits brought by educational institutions are individual veterans, and that the invalidation of the willful misconduct regulation will benefit not only petitioners but other veterans as well.

[32] By petitioners' count, two such suits have been filed in the Fourth Circuit, *see* American Federation of Government Employees, AFL-CIO v. Nimmo, 711 F.2d 28 (4th Cir. 1983) and

an examination of those suits indicates that they have not involved the courts in "technical and complex determinations and applications of Veterans' Administration policy." Rather, these suits have raised purely legal issues which the courts, not the VA, are uniquely competent and qualified to decide.[33]

2. Allowing Review Will Further The Goals Of The Rehabilitation Act And Will Ensure That All Persons Enjoy The Protection Of The Laws.

Allowing judicial review of the VA regulation challenged in this case will enhance two vital national policies. The first of these is the protection of the handicapped, including those suffering from alcoholism. The United States government formally has recognized that alcoholism is an illness to be treated rather than conduct to be condemned. This national policy was first enunciated by Congress in the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, Pub. L. No. 91-616, 84 Stat. 1848 (1970), 42 U.S.C. § 4541 (1982) ("Comprehensive Alcoholism Act"). The policy was reaffirmed by the passage of the Rehabilitation

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Plato v. Roudebush, 397 F.Supp. 1295 (D. Md. 1975); one in the Sixth Circuit, *see* Tinch v. Walters, 573 F. Supp. 346 (E.D. Tenn. 1983), *aff'd*, 765 F.2d 599 (6th Cir. 1985); two in the Seventh Circuit, *see* Taylor v. United States, 385 F. Supp. 1035 (N.D. Ill. 1974), *vacated and remanded*, 528 F.2d 60 (7th Cir. 1976), and Arnolds v. Veterans' Administration, 507 F. Supp. 128 (N.D. Ill. 1981); and two in the Eighth Circuit, *see* Burns v. Nimmo, 545 F. Supp. 544 (N.D. Iowa 1982) and Waterman v. Roudebush, No. 4-77-Civ. 70 (D.Minn. 1979).

[33] Petitioners' cases are good examples of such suits. They have involved purely legal questions suitable for prompt judicial resolution, and were both decided on motions for summary judgment.

Act, and its nondiscrimination provision codified at § 504. Yet, as described above, *see* pp. 19-30 *supra*, the willful misconduct regulation tramples upon the rights of alcoholics, as handicapped citizens, to enjoy the benefits available to others. If the willful misconduct regulation is immune from court review, the VA will continue to be free to ignore the Congressional commands set forth in the nondiscrimination provision of the Rehabilitation Act.

The second important national policy that would be advanced by permitting review here is " '[t]he very essence of civil liberty . . . the right of every individual to claim the protection of the laws.' " *Bowen v. Michigan Academy of Family Physicians, supra*, 106 S. Ct. at 2136 (quoting Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. 137, 163 (1803)). This right can have no meaning unless those entitled to claim the protection of the laws are afforded a forum in which to seek remedies for their violation. *Id.*, 106 S. Ct. at 2136.

This Court has protected this interest by presuming that Congress intends to permit judicial review of administrative agency action *unless* it expresses a clear intent to the contrary. As discussed previously, since Congress has not expressed such an intent with respect to VA regulations, this presumption must prevail here.

Moreover, divesting the courts of jurisdiction would leave petitioners without any forum to hear their civil rights claims, for the Board of Veterans' Appeals has disclaimed authority to decide this issue. *See* pp. 31-33 *supra*.

Under similar circumstances, this Court repeatedly has found it appropriate to subject binding regulations

to judicial review, notwithstanding preclusion statutes similar to § 211(a), if divesting the courts of jurisdiction would leave no forum at all in which to consider and decide important questions of law. *See, e.g., Bowen, supra*, 106 S. Ct. at 2138; *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Brock*, 106 S. Ct. 2523, 2530 (1986) (applying "frequently upheld" principle that, when individual eligibility determinations of benefit programs are left exclusively to state judicial and administrative processes, "claims that a program is being operated in contravention of a federal statute or the Constitution can nonetheless be brought in federal court") (citations omitted); *see also Wallace v. Christensen*, 802 F.2d 1539 (9th Cir. 1986) (decision holding process under Parole Act not shielded from review despite preclusion provision). This Court has not precluded review of regulations where no other relief was available, *see, e.g. Bowen, supra*, 106 S. Ct. at 2140-41, and should not permit that to happen here.

CONCLUSION

For the reasons discussed above, the Court should reverse the decisions of the Second Circuit in *Traynor* and the D.C. Circuit in *McKelvey* and invalidate the VA's willful misconduct regulation because it conflicts with § 504 of the Rehabilitation Act. Based on the findings of the district courts below, the Court should remand these cases to the respective Courts of Appeals with instructions that the courts order the VA to make petitioners' remaining educational benefits available to them.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1987

EUGENE TRAYNOR, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS AND VETERANS' ADMINISTRATION

JAMES P. MCKELVEY, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS AND VETERANS' ADMINISTRATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether 38 U.S.C. 211(a) precludes judicial review of a decision by the Veterans Administration denying a veteran's application for educational benefits and request to extend the statutory period within which the veteran may receive educational benefits.

2. Whether, if we assume that in these cases judicial review is not barred, the denial of benefits violated the Rehabilitation Act, 29 U.S.C. 794.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-622

EUGENE TRAYNOR, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS AND VETERANS' ADMINISTRATION

No. 86-737

JAMES P. MCKELVEY, PETITIONER

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS AND VETERANS' ADMINISTRATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals in No. 86-622 (Pet. App. 1a-38a) is reported at 791 F.2d 226. The opinion of the district court in No. 86-622 (Pet. App. 39a-82a) is reported at 606 F. Supp. 391. The opinion of the court of appeals in No. 86-737 (Pet. App. 1a-31a) is reported at 792 F.2d 194. The opinion of the district court in No. 86-737 (Pet. App. 32a-47a) is reported at 596 F. Supp. 1317.

JURISDICTION

The judgment of the court of appeals in No. 86-622 was entered on May 16, 1986. A petition for rehearing was denied on July 15, 1986 (Pet. App. 86a-87a). The petition for a writ of certiorari was filed on October 14, 1986 (a Tuesday following a legal holiday), and was granted on March 9, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

The judgment of the court of appeals in No. 86-737 was entered on May 30, 1986. A petition for rehearing was denied on August 7, 1986 (Pet. App. 49a). The petition for a writ of certiorari was filed on November 5, 1986, and was granted on March 9, 1987. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of 38 U.S.C. 211(a), of Section 203 of the G.I. Bill Improvement Act of 1977, Pub. L. No. 95-202, Tit. II, 91 Stat. 1439, 38 U.S.C. (Supp. II 1978) 1662, of 38 C.F.R. 3.301(c)(2), and of Veterans Administration Manual M21-1, are set out at App., *infra*, 1a-2a.

STATEMENT

1. Congress has, for many years, enacted legislation providing benefits to disabled veterans except where the disability resulted from the veteran's willful misconduct. See, *e.g.*, 38 U.S.C. 310, 410, 521 (disability pensions). The same exclusion from benefits also applies to the program involved in this case—educational benefits for veterans. The educational benefits statute authorizes the payment of benefits within ten years following the veteran's last discharge or release from active duty; however, the strict ten-year limit on educational benefits may be extended for those veterans who were unable to use their benefits during that period "because of a physical or mental disability which was not the result of * * * [their] own willful misconduct." Pub. L. No. 95-202, Tit. II, § 203(a)(1), 91 Stat. 1439, 38 U.S.C. 1662(a)(1).

In the cases presently before the Court, petitioners are veterans who did not utilize the full educational benefits available to them during their respective ten-year periods. In each case, petitioner sought to extend his period of eligibility, contending that he was disabled during part of the delimiting period because of alcoholism. The Veterans Administration (VA) denied extensions to both petitioners in accordance with its longstanding interpretation of the circumstances in which alcoholism would be regarded as "willful misconduct" within the meaning of the benefits statute.

The applicable VA regulation (38 C.F.R. 3.301(c)(2)) had been promulgated in 1972, prior to the enactment of the provision for extending the time limit within which disabled veterans could receive educational benefits. When the regulation was issued it was addressed primarily to alcoholism as a basis for disability pensions and incorporated principles set forth in a 1964 VA administrative decision. 37 Fed. Reg. 20335-20336 (1972) (proposed regulation); 37 Fed. Reg. 24662 (1972) (final regulation).[1] The 1964 administrative decision, drawing on VA rulings dating back to 1931, distinguished between "primary" alcoholism and alcoholism that is "secondary to and a manifestation of an acquired psychiatric disorder." Administrator's Decision No. 988 (Aug. 13, 1964) (J.A. 138, 142-143). Such "secondary" alcoholism is not considered willful misconduct (*id.* at 143). Nor does the 1964 VA decision regard as the product of willful misconduct any organic disorder caused by chronic alcoholism, such as cirrhosis of the liver, gastric ulcer, peripheral neuropathy, vitamin deficiency, or chronic brain syndrome (*id.* at 144). "While it is proper to hold a person responsible for the direct and immediate results

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[1] A companion provision (38 C.F.R. 3.301(c)(3)) establishes similar standards for determining when drug usage constitutes "willful misconduct" rendering the recipient ineligible for a disability pension or an educational benefits extension.

of indulgence in alcohol, it cannot be reasonably said that he expects and *wills* the disease and disabilities which sometimes appear as secondary effects" (*ibid.* (emphasis in original)).

Consistently with this policy, the VA grants extensions of the delimiting period to disabled veterans whose alcoholism is the secondary product of a psychiatric disorder or whose alcoholism has caused an organic disorder. The agency's policy does not permit an extension to be granted to an alcoholic veteran who cannot show the existence of either the specified underlying or derivative disorder. It also does not grant an extension on account of a disability suffered, for example, in an automobile accident by a veteran who was driving under the influence of alcohol. Should the VA deny a veteran's request to extend his delimiting period for receiving educational assistance benefits, that veteran would still remain eligible to receive a VA educational loan covering the full-time studies the veteran was pursuing when his delimiting period ended (38 U.S.C. 1662(a)(2)(A)).

2. No. 86-622: Eugene Traynor was honorably discharged from the Army on August 27, 1969, after serving on active duty for 18 months. He entered college in 1977 and received veterans' education assistance benefits until those benefits were terminated when his ten-year period of eligibility expired on August 27, 1979. Traynor, who had used nine and one-half of the 24 months of benefits available to him (based on length of service), sought to have his period of eligibility for benefits extended. He contended that he had been unable to utilize his full benefits within ten years of discharge because he had suffered from alcoholism for 15 years ending in 1974. Pet. App. 3a-4a.

During the administrative proceedings, Traynor asserted that the VA regulation stating the circumstances in which alcoholism constitutes willful misconduct is violative of the Rehabilitation Act, 29 U.S.C. 794. The Board of Veterans Appeals did not expressly adjudicate that statutory claim, noting that it was bound by VA

regulations. The Board did, however, explain that the consistent VA policy (Pet. App. 117a) is:

> that alcoholism can and should be considered an illness for purposes of medical treatment and rehabilitation, and that the simple drinking of any alcoholic beverage is not in and of itself willful misconduct. On the other hand, if in the consumption of alcohol for the purpose of enjoying its intoxicating effect excessive indulgence leads to disability, such disability will be considered the result of the person's willful misconduct.

Noting that "Congress has never enjoyed the luxury of having unlimited funds with which to provide for gratuitous Veterans Administration benefits," the Board explained that historically benefits have not been granted for a disability that results from willful misconduct (*id.* at 117a-118a). The Board observed that the veterans benefits programs have regarded alcoholism as potentially disqualifying misconduct ever since the earliest veterans regulations promulgated by President Roosevelt. The Board added that (*id.* at 118a-119a):

> Since then, a distinction has been maintained between fortuitously incurred disease or disability, for which gratuitous Veterans Administration benefits may be afforded, and other nonfortuitous disabilities incurred at the hands of the claimant himself/herself. Alcoholism is not singled out for special consideration; other disabilities may be considered the result of willful misconduct, under appropriate circumstances. Whether the illness i[n] question is alcoholism or some other disability, the Veterans Administration evaluates the circumstances of each individual in determining willful misconduct.

Finding no error in its prior determination that the facts of this case warranted a finding of willful misconduct, the Board denied Traynor's request for benefits beyond his delimiting date.

Traynor then filed suit in the United States District Court for the Southern District of New York. He alleged

that the VA decision violated the Rehabilitation Act, the Due Process Clause and the Equal Protection component of the Fifth Amendment. The district court held that "[s]ince [the complaint] requires us to examine constitutional and statutory questions and not merely issues of VA policy, we conclude, in accordance with the Supreme Court's holding in *Johnson* [v. *Robison*, 415 U.S. 361 (1974)], that we are not precluded from exercising our jurisdiction in this matter by 38 U.S.C. § 211(a)." Pet. App. 58a-59a. On the merits, the district court rejected the constitutional challenge (*id.* at 59a-64a), but held that the VA decision violated the Rehabilitation Act. The court held that alcoholism is a handicap covered by the Rehabilitation Act (*id.* at 69a-72a), and that the denial of benefits constitutes discrimination against alcoholics forbidden by that Act.

The court of appeals for the Second Circuit reversed. The panel majority held that 38 U.S.C. 211(a) bars judicial review of the Rehabilitation Act issue. The court stated (Pet. App. 16a-17a) that although "many veterans have in the service of our country suffered injuries that qualify them as 'handicapped individual[s]' for purposes of Section 504 of the [Rehabilitation Act] • • •, Congress did not delineate any exception to section 211(a) for 'handicapped' veterans when it passed section 504." Thus, the court explained, there is no basis for concluding that Congress intended "to grant to 'handicapped' veterans the judicial review traditionally denied all other veterans." Pet. App. 17a.

Judge Kearse dissented on the jurisdictional issue.[2] She suggested that Section 211(a) does not bar judicial review because the Rehabilitation Act neither provides benefits to veterans nor is it administered by the VA (Pet. App. 32a). In addition, Judge Kearse deemed Section 211(a) to be inapplicable because there was no decision of the Administrator on the Rehabilitation Act issue, the Board of Veterans Appeals having "refused, on the

[2] She expressed no view on the merits (Pet. App. 38a).

ground of lack of authority, to decide whether the challenged regulations violated the Rehabilitation Act" (Pet. App. 36a).

3. No. 86-737: Petitioner McKelvey was honorably discharged from the Army in September 1966 after serving on active duty for three years (Pet. App. 4a). From 1966 to 1971 he was employed as a salesman for a surgical supply corporation (C.A. App. 65-66, 89-90). During the next four years he was hospitalized at various times for alcoholism and associated conditions. He received educational benefits from the VA briefly in 1973 and 1974 (C.A. App. 76-77). When he applied for additional benefits in 1978, more than 10 years after his discharge, the Board of Veterans Appeals denied his request to extend his period of eligibility and rejected his application for benefits. The Board found, after a hearing, that there was " 'no evidence that an acquired psychiatric disease preceded [McKelvey's] alcoholism' " (Pet. App. 5a (citation omitted)).

McKelvey filed suit in the United States District Court for the District of Columbia. He claimed that the denial of benefits was based on a misconstruction of the "willful misconduct" language of the veterans benefits statute. He contended also that the VA decision constituted discrimination against the handicapped in violation of the Rehabilitation Act, an argument he had not presented in the administrative proceedings.

The district court held that it had jurisdiction to consider McKelvey's claims, stating that Section 211(a) "does not prevent judicial review of challenges to the VA's authority to promulgate regulations" (Pet. App. 36a). On the merits, the district court held that the VA had properly interpreted the "willful misconduct" standard of the veterans' benefits statute. The court noted that when Congress enacted the educational benefits extensions, the VA interpretation of "willful misconduct" already existed (in connection with earlier provisions on disability compensation), and that Congress specifically expressed an intent that the same interpretation be used

(*id.* at 40a, quoting S. Rep. 95-468, 95th Cong., 1st Sess. 69-70 (1977)). The district court reached a different conclusion on the Rehabilitation Act claim, holding that the VA interpretation constitutes discrimination against alcoholics in violation of Section 504 (Pet. App. 43a).

The court of appeals for the District of Columbia Circuit reversed. The court held that while Section 211(a) does not preclude judicial review of the Rehabilitation Act claim, petitioner's substantive statutory claim has no merit.

The court of appeals' decision on the jurisdictional issue rests on "the unusual, perhaps *sui generis* posture of this case" (Pet. App. 6a). The court focused on two particular facts: first, that a veteran is challenging the validity of a regulation under the Rehabilitation Act, a legal issue the Board of Veterans Appeals then regarded itself as lacking authority to decide, and second, that the VA had not otherwise made a determination on that issue prior to the filing of this lawsuit[3] (*id.* at 7a). Since, in the court's view, Section 211(a) is applicable only when a claim has been "resolved by an actual 'decision of the Administrator'" (*ibid.*, quoting *Johnson* v. *Robison*, 415 U.S. 361, 367 (1974)), it does not bar judicial review in these circumstances. The court emphasized "the narrowness of our holding" (86-737 Pet. App. 9a):

> [W]e do not anticipate another occasion to review a VA order on the basis that supports our review today. The VA has now determined it does have authority to decide on the effect and applicability of federal statutes other than veterans' legislation when the agency acts on benefits claims. We therefore expect that the VA will not again regard as outside

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[3] In response to the court's request at oral argument, the General Counsel of the VA took the position that the Rehabilitation Act does not invalidate the VA's interpretation of the "willful misconduct" language in Section 1662. The court held, however, that the General Counsel's letter did not constitute a "decision of the Administrator" for purposes of Section 211(a), since it was written after the case started. Pet. App. 7a-8a.

the arsenal of law it applies any potentially relevant congressional enactment.

On the merits, the court concluded that the VA could reasonably distinguish between those whose handicap was caused by their own willful misconduct, and those who are not responsible for their handicap. The VA's conclusion that alcoholics who cannot show an underlying psychiatric disorder are chargeable with willful misconduct reflects "general societal perceptions regarding personal responsibility" (Pet. App. 12a). Moreover, since "[a]lcoholism, unlike any other disability except drug addiction * * *, is self-inflicted * * * [,] [i]t is therefore feasible for alcoholism, as it is not for all other disabilities except drug addiction, to make a generalized determination that willfulness exists unless there is established the singular exculpation for self-infliction (psychiatric disorder) that the agency has chosen to acknowledge" (*id.* at 16a).

In a separate opinion, Judge Ginsburg concurred in the court's holding that Section 211(a) does not bar judicial review in the unique circumstances of this case, and she dissented from the court's holding on the merits (Pet. App. 17a).

Judge Scalia also wrote separately. He dissented from the court's holding that Section 211(a) is not applicable, stating that the "decision of the Administrator" which Section 211(a) immunizes from judicial review necessarily includes all issues within the competence of the agency to decide, "whether or not [the agency] specifically adverts to, or is even aware of them—just as a court necessarily 'decides' all issues logically essential to the validity of its holding whether or not it explicitly addresses or considers them" (Pet. App. 30a). Any other view of Section 211(a), he wrote, would enable "the Administrator * * * to control the scope of judicial review of his determinations by simply designating which underlying issues he chooses not to decide" (Pet. App.

30a). Judge Scalia concurred in the court's decision on the merits, upholding the validity of the VA regulation.

SUMMARY OF ARGUMENT

1. Section 211(a) bars judicial review in this case. The statute precludes review of "decisions of the Administrator on any question of law or fact under any law administered by the [VA] providing benefits." 38 U.S.C. 211(a). This case may be viewed as involving either a decision denying petitioners benefits, or a decision as to how the "willful misconduct" test of the veterans' benefits statute applies to alcoholics in light of the Rehabilitation Act. In either view, the case involves a "decision[] of the Administrator on any question of law or fact under any [veterans' benefits] law."

The legislative history of Section 211(a) supports this reading. The purpose of Section 211(a) was to avoid involving the courts in "day-to-day determination and interpretation of Veterans' Administration policy," particularly where that policy involves "technical considerations." *Johnson* v. *Robison*, 415 U.S. 361, 372, 373 (1974). The VA decisional process is tightly controlled by hundreds of regulations, many of them highly detailed and technical, appearing in nearly three hundred pages of the Code of Federal Regulations, 38 C.F.R. Pts. 3 and 4, as well as an even larger number of standards appearing in internal manuals. If challenges to regulations were subject to judicial review, "day-to-day determinations" involving "technical considerations" would be routinely brought into the courts. And many of these cases could be cast as complaints against handicap discrimination under the Rehabilitation Act, since a "disability" claimed to exist under the veterans' benefits law can often be described as a "handicap" under the Rehabilitation Act. Even if only a small percentage of administrative claims were to be litigated, a substantial addition to the federal court docket would result; in fiscal 1986, the Board of Veterans Appeals denied more than 28,000 claims.

2. Even if Section 211(a) were held not to bar judicial review in these cases, petitioners' challenges to the VA decisions would have to be rejected on their merits. The "willful misconduct" test of the veterans' benefits law was expressly intended by Congress to cover alcoholism and drug addiction and to endorse the VA's longstanding interpretation (which was cited in the Senate report). This language represents a deliberate congressional decision that these disabilities are unique in the sense that they frequently involve significant elements of volition. The VA regulations, by focusing the "willfulness" inquiry on whether an underlying psychiatric disorder exists, is a reasonable way of applying the "willful misconduct" test, and should be upheld.

The Rehabilitation Act was not intended to alter or repeal the specific determination by Congress in the veterans' benefits law to treat alcoholism and drug addiction as involving significant elements of volition. The Rehabilitation Act was not intended to forbid differing treatment of different handicaps, particularly where differing treatment is required by some other statute and is supported by significant medical knowledge. Here, even those medical authorities who label alcoholism a "disease" concede that it is a disease that can and often does involve significant elements of volition. Indeed, many authorities stress that the successful treatment of an alcoholic requires that the patient assume personal responsibility for abstaining from drink. In addition, the authorities agree that societal attitudes—which are reflected in laws and regulations—can also influence the prevalence of alcoholism. Just as this Court has rejected the argument that the "disease" label absolves alcoholics from criminal responsibility for their conduct, *Powell* v. *Texas*, 392 U.S. 514 (1968), so too Congress and the VA have reasonably decided that alcoholics should bear a degree of personal responsibility in connection with a benefits program.

ARGUMENT

I. SECTION 211(a) PRECLUDES JUDICIAL REVIEW OF VA DECISIONS ON VETERANS' BENEFITS CLAIMS, INCLUDING DECISIONS RESTING ON VA POLICY OR REGULATIONS AND DECISIONS INVOLVING POINTS OF LAW UNDER OTHER STATUTES

A. The Language and Legislative History of Section 211(a) Demonstrate That Congress Intended To Have Veterans' Benefits Claims Decided in an Informal, Nonadversarial Process and Without Judicial Review

Congress created the Veterans Administration in 1930 and vested in the VA responsibility for administering the federal program for veterans' benefits. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). In the expectation that the system for disbursing veterans' benefits would be as "informal and nonadversarial as possible" (*id.* at 323), Congress did not "contemplate the adversary mode of dispute resolution utilized by courts in this country" (*id.* at 309).[4] In accordance with that expectation, Congress also sought to "protect the Administrator from expensive and time-consuming litigation" by precluding judicial review of VA benefits decisions. *Rose* v. *Rose*, No. 85-1206 (May 18, 1987), slip op. 8; 38 U.S.C. 211(a). See *Walters*, 473 U.S. at 307; *Johnson* v. *Robison*, 415 U.S. 361, 370 (1974). Section 211(a) sets forth the prohibition of judicial review:

> [T]he decisions of the Administrator on any question of law or fact under any law administered by

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[4] This Court stated in *Walters* that (473 U.S. at 311) "[t]he process is designed to function with a high degree of informality and solicitude for the claimant. There is no statute of limitations, and a denial of benefits has no formal res judicata effect; a claimant may resubmit as long as he presents new facts not previously forwarded. See 38 C.F.R. §§ 3.104, 3.105 (1984)."

> the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

So plain and direct is this statutory proscription of judicial review that this Court has referred to Section 211(a) as the paradigm of the "unambiguous and comprehensive" language Congress employs when it intends to "bar judicial review altogether" (*Lindahl* v. *OPM*, 470 U.S. 768, 779-780 & n.13 (1985)).[5]

The legislative history of Section 211(a) also strongly supports the conclusion that Congress intended to preclude judicial review in the circumstances of these cases. Section 211(a) was originally enacted as Section 5 of the Economy Act of 1933, ch. 3, 48 Stat. 9 (emphasis added), which provided:

> *All decisions rendered by the Administrator of Veterans' Affairs under the provisions of this title,*

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[5] In Section 211(a) Congress has provided "clear and convincing" evidence (*Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967)) of its intent that VA benefits decisions not be subject to examination by the courts. Congress has evidenced this intent in terms that are " 'fairly discernible' in the details of the legislative scheme" and that are sufficiently clear to overcome "the general presumption favoring judicial review of administrative action" (*Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984), quoting *Data Processing Service* v. *Camp*, 397 U.S. 150, 157 (1970); see *Bowen* v. *Michigan Academy of Family Physicians*, No. 85-225 (June 9, 1986), slip op. 5 & n.4). That conclusion is supported by reference to the sources to which this Court ordinarily turns in assessing legislative intent: the express language of the statute, " 'the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved' " (*Lindahl* v. *OPM*, 470 U.S. at 779 (quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. at 345)). Where, as in these cases, there is "persuasive reason to believe" that Congress sought to preclude review, then that intent must be respected. *Morris* v. *Gressette*, 432 U.S. 491, 501 (1977); *Abbott Laboratories* v. *Gardner*, 387 U.S. at 140.

> *or the regulations issued pursuant thereto*, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision.

Congress could hardly prohibit judicial review in more explicit terms (see *Briscoe* v. *Bell*, 432 U.S. 404, 409 (1977)). The original statutory language clearly applied to all decisions under the veterans' benefits laws, and to all questions of law involved in those decisions, including questions arising under other statutes. An applicant for veterans' benefits seeks a decision under the veterans' benefits laws; and a decision denying a claim for veterans' benefits is a decision under the veterans' benefits laws, whether or not the claim for benefits involves consideration of additional statutes.

There is no indication that subsequent legislative changes in Section 211(a) were intended to change the original meaning. In 1940, the statute was amended to preclude judicial review of "the decisions of the Administrator of Veterans' Affairs *on any question of law or fact concerning a claim for benefits or payments under this or any other Act administered by the Veterans' Administration.*" Act of Oct. 17, 1940, ch. 893, § 11, 54 Stat. 1197 (emphasis added). The Senate Report that accompanied this amendment emphasized what the language of the amendment made obvious: that the statute "provides for the finality of decisions made by the Administrator of Veterans' Affairs *on questions relating to claims under any of the laws administered by the Veterans' Administration.*" S. Rep. 2198, 76th Cong., 3d Sess. 11 (1940) (emphasis added).

Thus, under the 1940 language, as well as the original 1933 language, Congress expressed its intent to preclude judicial review of all benefits decisions made by the VA Administrator, including decisions that involve questions of law arising under other statutes.

After a minor amendment in 1957 not affecting the present case,[6] the statute was amended in 1970 to preclude review of "decisions of the Administrator on any question of law or fact under any law administered by the [VA]." Act of Aug. 12, 1970, Pub. L. No. 91-376, § 8(a), 84 Stat. 790, codified at 38 U.S.C. 211(a). The 1970 amendment represented Congress's response to several decisions by the United States Court of Appeals for the District of Columbia Circuit that had construed the preclusion of judicial review too narrowly.

As this Court explained in *Johnson* v. *Robison*, 415 U.S. 361, 371, 373 (1974) (emphasis in original), the 1970 amendment was designed to *restore* the provision to its original unqualified meaning:

> Before [the 1970] amendment, the no-review clause made final "the decisions of the administrator on any question of law or fact *concerning a claim for benefits or payments* under [certain] law[s] administered by the Veterans' Administration" (emphasis added), 38 U.S.C. § 211(a) (1964 ed.), 71 Stat. 92. In a series of decisions, *e.g.*, *Wellman* v. *Whittier*, 104 U.S. App. D.C. 6, 259 F.2d 163 (1958); *Thompson* v. *Gleason*, 115 U.S. App. D.C. 201, 317 F.2d 901 (1962); and *Tracy* v. *Gleason*, 126 U.S. App. D.C. 415, 379 F.2d 469 (1967), the Court of Appeals for the District of Columbia Circuit interpreted the term "claim" as a limitation upon the reach of § 211(a), and as a consequence held that judicial review of actions by the administrator *subsequent* to an original grant of benefits was not barred.
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[6] The 1957 amendment changed the statute to preclude judicial review of the Administrator's decision "on any question of law or fact concerning a claim for benefits or payments under any law administered by the Veterans' Administration." Act of June 17, 1957, Pub. L. No. 85-56, § 211(a), 71 Stat. 92. The text of the 1933, 1940 and 1957 versions of the statute appear in *Daylo* v. *Administrator of Veterans' Affairs*, 501 F.2d 811, 813 (D.C. Cir. 1974).

> Thus, the 1970 amendment was enacted to overrule the interpretation of the Court of Appeals for the District of Columbia Circuit * * *.[7]

The Chairman of the House Committee on Veterans' Affairs argued that the District of Columbia Circuit's decisions gave "preferential treatment to a limited group of beneficiaries" by providing to them, and them alone, judicial review of VA benefits determinations. 116 Cong. Rec. 26490 (1970) (remarks of Congressman Teague). He recognized that such preferential treatment could be avoided either by making "court review * * * apply to all beneficiaries with equal force" or by making all VA benefits decisions nonreviewable (*ibid.*). In the 1970 amendment Congress sought to restore uniformity to the benefits process by opting for the latter approach. Chairman Teague explained that the statute "would seem to be perfectly clear in expressing the congressional intent that any and all decisions of the Administrator on questions of entitlement to veterans' benefits—[with the exception of claims on insurance contracts]—were to be final and not subject to judicial review." 116 Cong. Rec. 19734 (1970).

In sum, the history of Section 211(a) demonstrates that prior to the 1970 amendment, the statutory preclusion of review plainly applied to all decisions of the Administrator under the veterans' benefits laws, even where questions of law were raised under other statutes. The 1970 amendment was not intended to change this result; instead, it was designed to reaffirm the original meaning by overruling a series of judicial decisions that Congress viewed as erroneously narrowing the statute.

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[7] This Court's reading of the 1970 amendment, as intended to reaffirm the original meaning of the statute, is confirmed by the fact that in the 1970 amendment Congress retained the effective date of October 17, 1940. Pub. L. No. 91-376, § 8(a), 84 Stat. 790. Had the 1970 amendment been intended as a change, presumably a 1970 effective date would have been used.

B. The Legislative Purpose of Section 211(a) Supports Preclusion of Review in These Cases

This Court recently observed that the principal purposes of Section 211(a) are "to achieve uniformity in the administration of veterans' benefits and protect the Administrator from expensive and time-consuming litigation" (*Rose* v. *Rose*, No. 85-1206 (May 18, 1987), slip op. 8). Cognizant of these purposes, the Court has stated that Congress sought to avoid "involv[ing] the courts in day-to-day determination and interpretation of Veterans' Administration policy," particularly where that policy involves "technical considerations." *Johnson* v. *Robison*, 415 U.S. at 372, 373.[8] These legislative purposes would

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[8] The courts have articulated only two limited exceptions—not applicable here—to the statutory bar on judicial review: where a challenge is made to the constitutionality of a statute (*Johnson* v. *Robison*, *supra*) and where a challenge to a VA policy is made, not by a party seeking benefits, but by a third party affected by the policy who has no opportunity to be heard in administrative proceedings. See, *e.g.*, *Evergreen State College* v. *Cleland*, 621 F.2d 1002 (9th Cir. 1980); *University of Maryland* v. *Cleland*, 621 F.2d 98 (4th Cir. 1980); *Merged Area X (Education)* v. *Cleland*, 604 F.2d 1075 (8th Cir. 1979); *Wayne State University* v. *Cleland*, 590 F.2d 627 (6th Cir. 1978). The cases in the latter group were not brought by veterans seeking review of denials of benefits claims. Rather, they were brought by "educational institutions interested in the overall administration of the VA educational benefits program" (85-622 Pet. App. 18a). Petitioners argue (Br. 46 n.31) that in *Wayne State* and *Merged Area X* the educational institutions were joined as plaintiffs by individual veterans; but there is no indication in those opinions that the veterans were seeking to challenge their individual benefits determinations, or even that the VA had denied benefits to those veterans. In fact, the courts' rationale makes it clear that had the plaintiffs challenged the outcomes of individual benefits determinations, the courts would have held that Section 211(a) barred jurisdiction (604 F.2d at 1078; 590 F.2d at 632).

In situations where neither of these limited exceptions obtains, the general rule has prevailed, precluding judicial review of benefits decisions at the behest of the veteran. *E.g.*, *Barefield* v. *Byrd*, 320 F.2d 455 (5th Cir. 1963); *Milliken* v. *Gleason*, 332 F.2d 122 (1st Cir. 1964), cert. denied, 379 U.S. 1002 (1965); *Redfield* v.

plainly be advanced by precluding judicial review in these cases. Despite petitioners' efforts to portray this litigation as something other than a challenge to the VA's benefits decisions in their particular cases, each petitioner's complaint focuses on the circumstances of his individual benefits determination and each complaint requests the court to "[g]rant [petitioner's] application for an extension of his delimiting date" (J.A. 31; see *id.* at 129). Thus petitioners plainly seek to involve the courts in the "day-to-day determination and interpretation" of VA policy, a result that is directly contrary to Congress's objective.

Petitioners offer three arguments in favor of creating an exception to Section 211(a) in these cases: that law-

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Driver, 364 F.2d 812 (9th Cir. 1966); *Fritz* v. *Director of Veterans Administration*, 427 F.2d 154 (9th Cir. 1970); *Wickline* v. *Brooks*, 446 F.2d 1391 (4th Cir. 1971), cert. denied, 404 U.S. 1061 (1972); *Ross* v. *United States*, 462 F.2d 618 (9th Cir. 1972); *De Rodulfa* v. *United States*, 461 F.2d 1240 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972); *Holley* v. *United States*, 352 F. Supp. 175 (S.D. Ohio 1972), aff'd without opinion, 477 F.2d 600 (6th Cir.), cert. denied, 414 U.S. 1023 (1973); *Anderson* v. *VA*, 559 F.2d 935 (5th Cir. 1977); *Rosen* v. *Walters*, 719 F.2d 1422, 1424-1425 (9th Cir. 1983); *Pappanikoloaou* v. *Administrator of the Veterans Administration*, 762 F.2d 8, 9 (2d Cir. 1985); *Roberts* v. *Walters*, 792 F.2d 1109 (Fed. Cir. 1986).

It is true that, as petitioners state (Br. 42-45), there came a time long after Section 211(a) was enacted, and more than a decade after it was last amended, when the Administrator of the VA wrote that Section 211(a) "does not protect every decision, policy, or action of the VA from judicial scrutiny" (130 Cong. Rec. S6160 (daily ed. May 22, 1984)). That statement was not made in connection with the enactment, amendment, or reenactment of Section 211(a). The same is true of the floor statements, cited by petitioners (Br. 44-45), made by several individual members of the Senate in 1984, which are in any event inconclusive (see 130 Cong. Rec. S6158 (daily ed. May 22, 1984) (remarks of Senator Cranston) ("the VA and the Justice Department, despite my urging, refuse to agree to stop raising in court the bar to judicial review—section 211(a) of title 38—as a defense in all cases challenging VA regulations")). These snippets of subsequent legislative materials thus provide no guidance as to Congress's intent in enacting Section 211(a) in 1933 and amending it in 1940 and 1970.

suits challenging the legality of a policy or regulation should be permitted even if judicial review of individual benefit determinations is barred; that these cases involve decisions under the Rehabilitation Act rather than under a veterans' benefits statute; and that in these cases the VA did not conclusively decide the question arising under the Rehabilitation Act, so there is no "decision" to trigger the preclusion of review under Section 211(a). We address each contention in turn.

1. Petitioners' first theory would mean, at a minimum, that the VA's regulations as well as its manuals would be open to judicial review.[9] The courts would then face precisely the dangers that Congress sought to avoid, because these regulations and manuals are filled with detailed, technical provisions, prescribing in elaborate detail how veterans' benefits claims are to be decided.

The VA regulations comprise 272 pages in the 1986 edition of the Code of Federal Regulations (38 C.F.R. Pts. 3 and 4, at 126-398) and include detailed provisions on difficult and controversial subjects. For example, 11 pages address the question whether a disability is service-connected (38 C.F.R. 3.303-3.312), with detailed provisions relating to claims based on exposure to herbicides in Vietnam and exposure to ionizing radiation (38 C.F.R. 3.311a, 3.311b).[10] Part 4 has 95 pages elaborating on the rating of particular conditions, including 11 pages on neurological, convulsive and mental disorders (38 C.F.R. 4.120-4.132), as well as other provisions on im-

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[9] VA policy is typically embodied in two forms: (1) regulations appearing in Title 38 of the Code of Federal Regulations, and (2) internal manuals that amplify and explain the regulations. The present cases involve both types of policy enactment: the VA regulation (38 C.F.R. 3.301(c)(2)) and the VA's Adjudication Manual, which expands upon the terse language of the regulation.

[10] There is presently pending a suit challenging the VA's regulations and policies with respect to veterans' claims for disabilities allegedly resulting from exposure to herbicides in Vietnam. *Nehmer* v. *Veterans Administration*, No. 86-6160TEH (N.D. Cal.).

pairment of the musculoskeletal system (38 C.F.R. 4.40-4.73—25 pages), visual impairment (38 C.F.R. 4.75-4.84a—8 pages), auditory impairment (38 C.F.R. 4.85-4.87a—4 pages), cardiovascular diseases (38 C.F.R. 4.100-4.104—4 pages), and mental disorders (38 C.F.R. 4.125-4.132—5 pages).

The Code of Federal Regulations represents only the beginning of potentially litigable issues concerning veterans' disability claims should Section 211(a) be construed to have an implicit exception for VA regulations and policies. An even greater volume of policy pronouncements exists in manuals that amplify the rules set forth in the Code of Federal Regulations. These manuals constitute "instructions of the Administrator" that are binding on the Board of Veterans Appeals under 38 U.S.C. 4004. Under petitioners' construction of Section 211(a), the VA manuals would be subject to judicial review. See Pet. Br. 38-39.

For example, the VA regulation on alcoholism that is contained in the Code of Federal Regulations does not discuss the relationship between alcoholism and psychiatric disorders; for guidance on this topic, one must turn to the VA Manual M21-1, ch. 50, § 50.40a.(1) (entitled *Rating Procedure Relative to Specific Issues*), Subchapter XII (entitled *Mental Disorders*). The VA Manual M21-1, which prescribes policies for disability adjudications, has 56 chapters. Of these, at least 25 chapters contain provisions that are potential targets of litigation. In addition, another VA Manual M22-2 governs adjudication of claims for educational benefits; Parts II, III and IV of Manual M22-2, which deal with substantive issues arising in educational benefits claims, contain 31 chapters with detailed provisions that are potential targets of litigation.

With this volume of regulatory material waiting in the wings, it is apparent that the suggestion that judicial review be permitted for challenges to regulations and

policies would profoundly distort the informal, nonadversarial scheme Congress envisioned.[11]

Petitioners' reading of Section 211(a) finds no support either in the statutory language or in any conceivable view of the legislative intent. The language of the statute precludes review of "decisions of the Administrator on any question of law." The statute does not, as petitioners would have it, limit preclusion of review to "decisions of the Administrator on any question of law (except for decisions embodied in a regulation or manual)."

Nor is there any reason to suppose that Congress intended to except from the statutory bar on judicial review those decisions of law that are embodied in VA regulations. Such an exception would serve no discernible congressional purpose. The VA, like most administrative agencies, is free to develop substantive standards under its governing statute either by regulation, by case-by-case adjudication, or by a combination of the two. *NAACP* v. *FPC*, 425 U.S. 662, 668 (1976); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947). While there may be instances in which reliance on adjudication rather than rulemaking would be an abuse of discretion, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974), certainly in applying the "willful misconduct" standard of the veterans' benefits statute—as well as the anti-discrimination provision of the Rehabilitation Act—the

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[11] Nor is it accurate to suggest that judicial review of challenges to policies and regulations would not greatly burden the VA with litigation because, unlike lawsuits challenging individual benefits decisions, the validity of a policy or regulation need be litigated only once. Nothing requires all possible challenges to a regulation by various persons to be presented in a single lawsuit, and a regulation could be challenged unsuccessfully by different persons many times. Revisions in the regulations would be subject to similar challenges. And even if it were true that each policy or regulation would be the subject of litigation only once, the sheer volume of VA policies and regulations would produce the substantial, costly litigation Congress precluded.

VA has discretion to develop standards through the process of case-by-case adjudication rather than by regulation. In fact, the VA's interpretation of the statutory "willful misconduct" standard as applied to alcoholism originated in decisions on specific benefit claims (see page 3, *supra*; pages 28-29, *infra*).

Under petitioners' interpretation, the federal courts could review a policy or legal standard announced in a regulation, but not in an individual decision on a claim for benefits. But they offer no cogent reason why Congress would create—and no evidence that Congress intended to create—a system barring judicial review where an interpretation is adopted in an adjudicative context (with no prior notice to the general public and with retroactive effect on the parties), but allowing judicial review if the same interpretation were adopted prospectively after public notice and comment. If petitioners' theory were the law, then the agency would have a strong incentive to maintain uniformity in its decisions and minimize its litigation costs by developing standards and policies through case-by-case administrative adjudication rather than regulation, thereby depriving the public of the advantages of the public notice and comment involved in rulemaking proceedings. Congress could not have intended such a bizarre result.[12]

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[12] The First Circuit, in the context of a statute barring judicial review of actions taken under the Federal Employees Compensation Act (5 U.S.C. 8128(b)), recently characterized an argument identical to petitioners' as a distortion of the statute. *Paluca* v. *Secretary of Labor*, 813 F.2d 524, 527 (1987). The First Circuit stated (*ibid.* (footnote omitted; emphasis in original)):

> It would create the absurd result of permitting a court to strike down a policy statement of the Secretary, notwithstanding the court's inability to review any subsequent individual adjudications for conformance with its policy decision. As recently stated by the Court of Appeals for the District of Columbia, it is individual determinations that "have traditionally been accorded *more* rather than *less* judicial protection against agency error than generally applicable rules. Compare *Bi-Metalic Investment Co.* v. *State Board of Equalization*, 239

2. Petitioners' second contention is that judicial review is not barred in these cases because the VA's decisions were made under the Rehabilitation Act rather than under a veterans' benefits statute. This is the theory espoused in Judge Kearse's dissenting opinion (86-622 Pet. App. 25a-38a). On this view, Section 211(a) would be limited to instances in which the Administrator's decision was made *exclusively* under a veterans' benefits statute and involved no consideration of other statutes. Petitioners' theory does not flow naturally or comfortably from the language of Section 211(a). The VA decisions denying additional benefits to petitioners and denying petitioners' requests to extend their delimiting dates are, by any standard, decisions under a "law administered by the Veterans' Administration providing benefits." That the VA may have been asked by petitioner McKelvey (though not by petitioner Traynor) to consider the effect of the Rehabilitation Act on his claim under the educational benefits program does not cause the agency's decision to cease being a decision under a veterans' benefits law. It is that law, rather than the Rehabilitation Act, that authorizes the benefits being sought. And, as the legislative history shows (see pages 13-16, *supra*), Congress viewed Section 211(a) as barring review of all decisions of the Administrator implementing a veterans benefits program—regardless of whether those decisions arguably required the administrator to consider additional statutes, such as the Administrative Procedure Act, 5 U.S.C. 706(2)(A) and (E), or the Rehabilitation Act.

Indeed, it is difficult to conceive of a case in which a veteran claiming a "disability" under a veterans' benefits

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U.S. 441 (1915) *with Londoner* v. *Denver*, 210 U.S. 373 (1908)." *Gott* v. *Walters*, 756 F.2d 902, 915 (1985) (Scalia, J.). * * * [Plaintiffs'] suggestion makes no sense, because the Secretary would be free, in individual adjudications, to ignore anything we say, and because it conflicts with one of the major purposes of § 8128(b): "that the Secretary should be free to make the policy choices associated with disability decisions." *Rodriguez* v. *Donovan*, 769 F.2d 1344, 1348 (9th Cir. 1985).

statute could not also claim a "handicap" under the Rehabilitation Act. The predictable consequence of a rule allowing judicial review for veterans claiming Rehabilitation Act protection is that such claims would routinely be recited in lawsuits challenging VA benefits decisions. The result would be to involve the courts in "day-to-day determination and interpretation of Veterans' Administration policy" (*Johnson* v. *Robison*, 415 U.S. at 372) —the very result Section 211(a) was intended to preclude.

3. Petitioners' third theory for avoiding the jurisdictional bar of Section 211(a) is that the statute does not apply here because the VA did not expressly "decide" the question whether the agency's regulation on alcoholism violated the Rehabilitation Act. Petitioners' theory is incompatible with established principles of administrative law.

Even in cases where judicial review of agency action is available, courts employ the exhaustion doctrine in order to insure that the agency has had an opportunity to address the legal questions presented. Among the salutary effects of the exhaustion doctrine are that the agency decision may dispose of the matter in a fashion that makes further review unnecessary and that, should judicial proceedings ensue, the court will have the benefit of the agency's views. *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *McKart* v. *United States*, 395 U.S. 185, 200 (1969); cf. *Bowen* v. *City of New York*, No. 84-1923 (June 2, 1986), slip op. 16-17.

Petitioners' tortured reading of Section 211(a) proceeds from just the opposite premise. Under their theory, judicial review would exist only where a court does not have the benefit of the agency's view on the subject, viz., only on those questions of law raised in the administrative proceedings which the Administrator did not expressly "decide." [13] Conversely, it is only by "deciding"

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[13] The extreme reach of the theory is evident on the record in No. 86-737, where petitioner McKelvey did not even raise any question under the Rehabilitation Act in the administrative pro-

an issue that the Administrator could trigger the statutory proscription of judicial review. There is no evidence that Congress intended to make the jurisdiction of the federal courts hinge on the *absence* of an agency's statement of its views on a particular question of law. Nor is there any reason to believe that Congress would have crafted the peculiar system petitioners posit: a system that discourages parties from raising legal issues in agency proceedings (in order to preserve judicial "review") and simultaneously encourages the agency to express views on issues that otherwise would not be reached (in order to preserve the finality of agency adjudication and to defeat judicial review). See 86-737 Pet. App. 30a (Scalia, J., dissenting).

II. THE VA'S CRITERIA FOR APPLYING THE "WILLFUL MISCONDUCT" STANDARD OF THE VETERANS' BENEFITS LAWS IS A REASONABLE MEANS OF IMPLEMENTING THOSE LAWS AND IS NOT INCONSISTENT WITH THE REHABILITATION ACT

Because the courts lack jurisdiction in these cases, it is unnecessary for this Court to consider petitioners' contention that the challenged VA regulation and the VA's denials of benefits on these cases are violative of the Rehabilitation Act. However, should this Court determine that the jurisdictional issue is not dispositive, the decisions below should be affirmed on the alternative ground that petitioners' Rehabilitation Act claims are without merit.

In challenging the VA's policy on alcoholism, petitioners and amici curiae raise a subject that has long bedeviled scholars in a variety of disciplines: the crafting of a normative cultural view on alcohol and alcoholism.

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ceedings. Had he raised the Rehabilitation Act issue, and had that issue been expressly decided by the VA, then presumably Section 211(a) would bar judicial review of that "decision." Petitioner's theory thus would discourage parties from raising before the agency questions on which judicial review may later be sought.

The striking disagreements the subject provokes are reflected in the various descriptions of alcohol as "a valuable food and commodity, a 'gift of God' " (Blume, *Public Policy Issues*, in *Alcoholism and Related Problems: Issues For The American Public* 179 (1984)) and as the "verray sepulture [o]f mannes wit and his discrecioun" (G. Chaucer, *The Canterbury Tales (The Pardoner's Tale)* in *Chaucer's Poetry* 314 (E. Donaldson ed. 1958).

The complexities of the subject are magnified in these cases by the effort to frame the legal issues within the nomenclature of medicine. The briefs of petitioners and their supporting amici appear to proceed from the assumption that the dispositive issue in the case is whether alcoholism is a disease and, in urging reversal, rely on recent medical literature to support the proposition that it is. But the issue in these cases is not a medical issue, it is the legal issue of determining Congress's intent in enacting the relevant statutes.[14] It is thus of little consequence to the legal analysis whether alcoholism is or is not a disease because that term does not foreclose the possibility of voluntary conduct; nor is the search for the congressional intent underlying statutes enacted in the late 1970's advanced by citations to the medical literature circa 1987. In any event, as we will discuss, despite substantial recent medical progress in the understanding of alcoholism, the observations in this Court's plurality opin-

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[14] See *Powell* v. *Texas*, 392 U.S. at 526 (plurality opinion) (footnote omitted) (pointing out "the conceptual difficulties inevitably attendant upon the importation of scientific and medical models into a legal system generally predicated upon a different set of assumptions"); *id.* at 541 (Black, J., concurring) ("Medical decisions concerning the use of a term such as 'disease' or 'volition,' based as they are on the clinical problems of diagnosis and treatment, bear no necessary correspondence to the legal decision whether the overall objectives of the criminal law can be furthered by imposing punishment."); M. Guttmacher, *The Role of Psychiatry in Law: The Irresistible Impulse* 53-54 (1968) ("It is my earnest hope that the psychiatrist will not be assigned the task of expressing gradations of responsibility for the alcoholic offender but will be required only to furnish clinical diagnoses, when that is possible.").

ion in *Powell* v. *Texas*, 392 U.S. at 522 (footnote omitted; emphasis in original) retain their validity:

> the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that "alcoholism" is a "disease." One of the principal works in the field * * * concludes that *"a disease is what the medical profession recognizes as such."* In other words, there is widespread agreement today that "alcoholism" is a "disease" for the simple reason that the medical profession has concluded that it should attempt to treat those who have drinking problems. There the agreement stops.[15]

We therefore focus our analysis of the statutory issues in these cases on the language Congress adopted and its programmatic context, the legislative history, and the longstanding agency interpretation.

A. VA Regulations Have Historically Considered Some Forms of Alcoholism to be "Willful Misconduct" Barring Disability Pensions

For many years, disability compensation for veterans has been subject to a statutory bar where "the disability is the result of the veteran's own willful misconduct." 38 U.S.C. 310 (disability compensation for injuries suffered or diseases contracted in line of duty). See also 38 U.S.C. 410 (survivors' benefits); 38 U.S.C. 521 (compensation for non-service connected disabilities).[16] Over

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[15] A recent article cited (at 5) in the amicus brief of the American Medical Association, states (*Categories, Careers, and Outcomes of Alcoholism*, The Lancet 719 (Mar. 29, 1986) (emphasis added)):

> Although the medical and neuropsychiatric consequences of excessive drinking have long been established as matters of clinical concern, the notion that alcoholism—the thing itself—is a "disease" is more recent *and more controversial.*

[16] The "willful misconduct" test is derived from the benefits statute for World War I veterans. Act of Oct. 6, 1917, ch. 105, § 300, 40 Stat. 405.

the decades in which disability benefits programs for veterans have been administered, the definition of "willful misconduct" has achieved general acceptance in many specific applications, including its application to alcoholism. The VA first had occasion to consider the "willful misconduct" standard in relation to the consumption of alcoholic beverages in an administrative decision in 1931 (Administrator's Decision No. 2 (Mar. 21, 1931) (J.A. 133-137)). In that case, the Administrator granted compensation to veterans who had been paralyzed from drinking "jamaica ginger," on the ground that the substance they drank was not known to be poisonous. In dictum, however, the Administrator stated that "if in the drinking of any beverage for the purpose of enjoying its intoxicating effects, excessive indulgence leads to disability, wilful misconduct would undoubtedly inhere in the act" (*id.* at 136). This dictum was later incorporated in a regulation and manual, which stated the test to be: "Was there excessive indulgence and was it the proximate cause of the injury or disease in question" (*id.* at 139-140).

In 1964 the VA clarified its policy on alcoholism in two significant respects. Taken together these clarifications showed that the willful misconduct standard did not disqualify all alcoholics from receiving benefits and that large categories of persons disabled by alcoholism were expressly permitted to obtain benefits. The Administrator announced these policy modifications in an administrative decision (Administrator's Decision No. 988 (Aug. 13, 1964) (J.A. 138-146). First, the Administrator drew a distinction between primary alcoholism and alcoholism "secondary to and a manifestation of an acquired psychiatric disorder" and held that the latter condition, secondary alcoholism, is not to be considered as willful misconduct (*id.* at 143).[17] The Administrator's 1964 deci-

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[17] By one estimate, 20% to 30% of alcoholics fall within this "secondary" category. See American Medical Association Amicus Br. 7. One of the medical texts cited by amicus National

sion also removed the "willful misconduct" label from those alcoholics, both primary and secondary, whose conditions had produced derivative disabling effects, including "cirrhosis of the liver to gastric ulcer, peripheral neuropathy, vitamin deficiency, chronic brain syndrome or simply acceleration of debility of age" (*id.* at 144).

In 1972, the VA issued its present regulation. Drawing upon the language of the 1931 "jamaica ginger" decision, it states (38 C.F.R. 3.301(c)(2)):

> If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct.

In issuing the regulation, the VA announced that it was intended to incorporate the principles of the 1964 administrative decision. 37 Fed. Reg. 20335, 20336 (1972) (proposed regulation); 37 Fed. Reg. 24662 (1972) (final regulation). Consequently, the VA Manual incorporates

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Council on Alcoholism, Inc. (Br. 14, 19, 26), and by amici American Medical Association, *et al.* (Br. 8), describes as a "major group * * * those alcoholics who develop drinking problems after the onset of a major psychiatric disorder such as manic-depressive illness, anxiety-panic disorder, or schizophrenia. * * * These individuals can be considered secondary alcoholics" (S. Zimberg, *The Clinical Management of Alcoholism* 153 (1982)). The same text stresses that "[a] distinction must be made between the primary and the secondary alcoholic" (*id.* at 20; see *id.* at 40-41). The author of that text, Dr. Zimberg, submitted an affidavit in the district court in No. 86-622 (J.A. 56-80).

An article cited as authoritative by the amici American Medical Association, *et al.* endorses distinctions between primary and secondary alcoholism, describing a survey indicating that secondary alcoholism is more difficult to control. *Categories, Careers, and Outcomes of Alcoholism*, The Lancet 719 (Mar. 29, 1986). In this survey, the primary alcoholics had a "lower intensity of drinking, and fewer social problems than most in the secondary categories," while the secondary alcoholics had "the poorest clinical outcomes with, as might be expected, higher rates of social and forensic problems" (*ibid.*).

the 1964 decision, stating that alcoholism is not a compensable disability unless it is "secondary to and a manifestation of a psychotic, psychoneurotic or psychophysiologic disorder," in which case the rating official is to "consider the alcoholism part and parcel of the disability and rate as one disease entity, e.g., schizophrenia with alcoholism." VA Manual M21-1, ch. 50, Subchapter XII (see S. Zimberg, *supra*, at 41). Thus, by 1977, when Congress enacted the provision extending for disabled veterans the ten-year limitation on educational benefits, the "willful misconduct" exclusion had a long history and an established administrative interpretation.

B. The 1977 Amendment of the G.I. Bill Incorporated the VA's Existing "Willful Misconduct" Test

Since the 1940's the VA has granted educational assistance to eligible veterans. Congress added the ten-year delimiting period in 1974 (Pub. L. No. 93-337, § 1(1), 88 Stat. 292). In 1977, Congress amended the statute to provide for the first time for extensions of the delimiting period for veterans who were prevented from initiating or completing their education "because of a physical or mental disability which was not the result of such veteran's own willful misconduct." Pub. L. No. 95-202, Title II, § 203(a)(1), 91 Stat. 1439, 38 U.S.C. 1662 (a)(1).

The legislative history of the 1977 amendment shows that in choosing the term "willful misconduct" Congress was aware that it was requiring the same test that was already in the statute as a bar to disability pensions, and that Congress intended to adopt the interpretation the VA had already given to that term in the disability pension context. The report of the Senate Veterans' Affairs Committee makes explicit the legislative awareness of and acquiescence in the VA interpretation of "willful misconduct." The Senate Report states that "[i]n determining whether the disability sustained was a result of the veteran's own 'willful misconduct', the Committee

intends that the same standards be applied as are utilized in determining eligibility for other VA programs under title 38. In this connection, see 38 CFR part III, paragraphs 3.1(n) and 3.301 [the "willful misconduct" regulation], and VA Manual M21-1, section 1404."[18] S. Rep. 95-468, 95th Cong., 1st Sess. 69-70 (1977). This Court has often stated that committee reports "contain the authoritative source for finding the Legislative intent" and "represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation" (*Garcia* v. *United States*, 469 U.S. 76, 76 (1984), *quoting Zuber* v. *Allen*, 396 U.S. 168, 186 (1969)).

The legislative history of the 1977 amendment thus confirms the conclusion otherwise indicated by settled principles of statutory construction: that Congress's use of the term should be given the same meaning in all applications. See *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, 461 U.S. 624, 633 (1983); *Bob Jones University* v. *United States*, 461 U.S. 574, 586-587 & n.10 (1983); *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 489 (1985). The conclusion that Congress chose to have the VA apply the same test in the same manner to both disability pensions and education benefits is well-supported by the factors this Court ordinarily employs in assessing whether an administrative interpretation is faithful to legislative intent. As this Court observed in an analogous context in *Alcoa* v. *Central Lincoln Peoples' Utility District*, 467 U.S. 380, 390 (1984): "[t]he subject under regulation is technical and complex. [The agency] has longstanding expertise in the area, and was intimately involved in the drafting and consideration of the statute by Congress. Following enactment of the

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[18] The cited Manual provision states that "[b]asic principles for application in deciding cases involving alcoholism are stated in Administrator's Decision No. 988 * * *." Administrator's Decision No. 988 is the 1964 decision upon which the VA regulation is based (see J.A. 138-146).

statute the agency immediately interpreted the statute in the manner now under challenge." Moreover, the Administrator, whose interpretation is entitled to considerable deference, has consistently and prominently interpreted the term "willful misconduct" with regard to alcoholism both before and after passage of the 1977 amendment; Congress was aware of the Administrator's interpretation and therefore should, at the very least, be viewed as having implicitly approved that interpretation when it employed the same term in the 1977 amendment (*City of Pleasant Grove* v. *United States*, No. 85-1244 (Jan. 21, 1987), slip op. 5-6; *United States* v. *Sheffield Bd. of Comm'rs*, 435 U.S. 110, 131-135 (1978)). In fact, Congress's approval is explicitly stated in the Senate report. It is, accordingly, clear that in 1977, when Congress enacted the extension of the delimiting period for disabled veterans whose disability was not caused by willful misconduct, Congress understood precisely how that language would be interpreted in cases where the claimed disability is alcoholism.

C. The 1978 Rehabilitation Act Amendment did not Alter the Effect of the 1977 G.I. Bill Amendment

Despite the clarity of the situation in 1977, petitioners and amici supporting them contend that subsequent events have overtaken Congress's explicit approval of the relevant VA regulation. Although cast in different forms, petitioners' principal argument is that amendments to the Rehabilitation Act in 1978 effectively nullified the VA regulation. Thus, petitioners contend that alcoholism should be regarded as a disease, that the conduct of drinking is inseparable from the disease itself, and therefore that the Rehabilitation Act prohibits the VA from concluding that an alcoholic's drinking can ever have a volitional component.[19] Under this argument, an

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[19] The very existence, let alone extensive membership, of the Alcoholics Anonymous organization (see pages 45-47, *infra*) is not easily reconciled with this aspect of petitioners' contentions.

alcoholic veteran who had been disabled by drinking during the statutory period is ipso facto entitled to an extension of the delimiting period for educational benefits.[20] Since the same "willful misconduct" standard applies also to the grant of veterans' disability pensions, acceptance of petitioners' argument would lend credence to the quite surprising notion that the government is obligated to pay disability pensions to all persons claiming to suffer from alcoholism.

Petitioners' argument is seriously flawed. As we now discuss, the 1978 amendments to the Rehabilitation Act did not repeal the recent congressional judgment that extensions of the delimiting period would be unavailable to persons who bear some responsibility for their disabilities. Nor does the Rehabilitation Act prevent the government from making reasonable distinctions among types of handicaps.

Before we turn to that discussion, some further context for the issues is useful. We have said that the issue in this case is not whether alcoholism is a disease, nor is there an issue whether alcoholism is a handicap cognizable under the Rehabilitation Act (see 43 Op. Att'y Gen. 12 (1977)). For, even if it is a disease, it would not necessarily follow that all alcoholics are disabled. The statute requires that a veteran suffer from a *disability* in order to qualify for an extension of his delimiting period. Moreover, even if one accepts the disease conception of alcoholism and considers only those veterans whose alcholism is disabling, that would not necessarily preclude scrutiny of the veteran's conduct or his volition as a contributing cause of his disability.

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[20] Amici American Medical Association, *et al.* make a somewhat different argument. Conceding that the Rehabilitation Act still allows the G.I. Bill's "willful misconduct" standard to be applied to alcoholics, the amici argue that the Act requires the determination to be made on a case-by-case basis, without the aid of any regulation requiring the factfinder to focus on the presence or absence of an underlying psychological disorder.

Alcoholism, like drug addiction, may well be a disease as petitioners argue; but, as even the medical authorities cited by amici recognize, alcoholism "cannot be reified but reflects a collection of various symptoms and episodic behaviors that collectively make up perhaps as many alcoholisms as there are alcohol abusers" (G. Vaillant, *The Natural History of Alcoholism* 3 (1983)). In short, alcoholism is not a unitary condition. Substance abuse, particularly alcoholism, has multiple forms and ranges of severity,[21] and is acknowledged to be unlike other diseases in the sense that it frequently involves a significant volitional element, in both its genesis and its treatment.[22] As we show, it is reasonable in the con-

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[21] See, *e.g.*, E. Jellinek, *The Disease Concept of Alcoholism* 35-41 (1960) (identifying five different types of alcoholics, only two of which are regarded as suffering from a "disease"); S. Zimberg, *supra*, at 20 (distinguishing between primary and secondary alcoholism); Bohman, *et al.*, *Maternal Inheritance of Alcohol Abuse*, 38 Arch. Gen. Psychiatry 965, 968 (1981) (describing genetically different types of susceptibility to alcoholism, each producing a different form of alcoholism); Cloninger, *et al.*, *Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Adopted Men* 38 Arch. Gen. Psychiatry 861, 867 (1981) (identifying two types of alcohol abuse with different genetic and environmental causes); Schuckit, *Genetic Aspects of Alcoholism*, 15 Annals of Emergency Medicine 991-992 (1986) (distinguishing primary alcoholism from secondary alcoholism, which occurs "in the context of another major preexisting psychiatric illness"); American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 129-138, 163-170 (3d ed. 1980) [hereinafter DSM-III] (identifying seven organic mental disorders attributed to the ingestion of alcohol, all of which are distinguished from alcohol abuse and alcohol dependence).

"[A]lcohol abuse reflects a multidetermined continuum of drinking behaviors whose determinants are differently weighted for different people and include culture, habits, social mores ,and genes" (G. Vaillant, *supra*, at 17). See Zimberg, *Office Psychotherapy of Alcoholism* in *Alcoholism and Clinical Psychiatry* 218 (J. Solomon ed. 1982) ("alcoholism does not occur as an all-or-none phenomenon but has varying degrees in the same individual").

[22] One medical commentator states that "[l]ike an automobile driver who chooses to drive rapidly down a busy highway in a car

text of this particular disease, unlike other diseases, for the VA to draw a distinction based on a showing of an underlying psychological disorder or disabling derivative effects; it is a distinction that is paralleled in the medical literature and that faithfully implements Congress's decision not to permit extensions of the delimiting period (or disability pensions) for veterans whose disabilities were caused by willful misconduct. Although the VA policy may not be expressed in precisely the terms medical science would use, and although the policy may not produce in an individual case the same conclusion another arbiter might reach, the VA policy provides a reasonable and workable accommodation of modern medico-psychological evidence and Congress's instructions in the veterans' benefits statute. Perhaps, as medical science makes further advances, some modification of the statutory standard will be indicated; but that is a judgment to be made by Congress, not by the courts.

1. *The Rehabilitation Act does not prohibit reasonable distinctions among different types of handicaps*

When first enacted in 1973, the Rehabilitation Act's bar on discrimination against handicapped persons did not apply to federal government programs; it was limited to federally-funded programs and activities. Pub. L. No. 93-112, Tit. V, § 504, 87 Stat. 394. The original statutory definition of a handicapped individual was a person who has a physical or mental disability that results in a substantial handicap to employment (Pub. L. No. 93-112, § 7(6), 87 Stat. 361). Congress expanded that definition in 1974 to include, for purposes of Section 504, a person who has a physical or mental impair-

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with defective brakes and ends up spending two years in an orthopedic rehabilitation clinic, the alcoholic may consciously have made some early decisions related to his eventual disorder. But such conscious choice becomes less and less important with the passage of time" (G. Vaillant, *supra*, at 17).

ment which substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment. Pub. L. No. 93-516, Tit. I, § 111(a), 88 Stat. 1619. In the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. No. 95-602, Tit. I, 92 Stat. 2955), Congress further amended the Rehabilitation Act in two ways that are significant to this case.

Section 504 was amended to prohibit discrimination "under any program or activity conducted by any Executive agency or by the United States Postal Service," and required the heads of those agencies to promulgate regulations prohibiting discrimination against handicapped persons (Pub. L. No. 95-602, Tit. I, §§ 119, 122(d)(2), 92 Stat. 2982, 2987, 29 U.S.C. 794). Congress also amended the definition of "handicapped person" to state that for purposes of Section 504, in the employment context, the term "does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others" (Pub. L. No. 95-602, Tit. 1, § 122(a)(6), 92 Stat. 2985, 29 U.S.C. 706(7)(B)).

Petitioners' principal contention is that the 1978 amendments to the Rehabilitation Act invalidated the VA regulation concerning alcoholism. Since Congress had expressly approved that VA regulation in 1977, petitioners' argument is reduced to the proposition that the Rehabilitation Act amendments implicitly repealed the 1977 VA Benefits Law amendments.[23] The short answer

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[23] Of course, Congress did not expressly repeal the 1977 VA amendments. Moreover, neither the language nor the legislative history of the 1978 Rehabilitation Act amendments evidences any congressional awareness of an effect on the veterans' educational benefit extension provision or any congressional intent to repeal a standard it had endorsed just one year earlier.

to petitioners' argument is, as this Court has stated repeatedly, that a subsequent statute will not be held to repeal an earlier statute by implication, especially where the later enactment is general and the earlier statute is specific. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974); *Silver* v. *NYSE*, 373 U.S. 341, 357 (1963); *Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936); *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 363 (1842).

Moreover, there are strong indications that Congress regarded the 1977 G.I. Bill amendment and the VA regulation as retaining their full force notwithstanding the 1978 Rehabilitation Act amendment. In 1979, the Senate Committee on Veterans' Affairs revisited the VA's interpretation of the "willful misconduct" test for extensions of the delimiting period as that test applied to alcohol or drug dependence disabilities. Although, upon reexamination, the Committee preferred to have the VA grant a "delimiting period extension when the veteran was prevented, during part or all of the ordinary 10-year delimiting period, from using GI Bill benefits by a drug or alcohol disability and the veteran has recovered from the disability," the Committee recognized that new legislation would be needed to effect that result since the VA's contrary interpretation had been expressly endorsed in the Senate Report accompanying the 1977 amendment. S. Rep. 96-314, 96th Cong., 1st Sess. 25 (1979). Accordingly, the Committee concluded that "in light of the legislative history [of the 1977 amendments], the VA has had little choice but to deny such extensions involving alcohol and drug abuse or addiction disabilities" (*ibid.*). On four occasions between 1979 and 1984 the Senate passed bills containing amendments that would have eliminated the "willful misconduct" test for VA educational benefits extensions (while retaining the test for VA disability benefits), but none of the bills passed the House. See S. Rep. 98-604, 98th Cong., 2d Sess. 38-39 (1984) (summarizing legislative history).

There is not the slightest suggestion in the legislative history that, as petitioners' theory assumes, modification of the G.I. Bill was regarded as unnecessary in light of the Rehabilitation Act's 1978 amendments. Rather, "despite the [Senate] Committee's strongest urgings, the House would accept neither the GI Bill nor the rehabilitation program provision for delimiting-period extensions based on drug or alcohol disabilities" (*id.* at 39); see 126 Cong. Rec. 27578 (1980) (remarks of Senator Cranston, Chairman, Committee on Veterans' Affairs) ("the House was adamant in its refusal to accept this provision"). If, as petitioners urge, the Rehabilitation Act amendments invalidated the VA regulation on alcoholism or superseded that regulation with respect to the educational benefits delimiting-period extension, that fact seems to have eluded Congress.

The various refinements of petitioners' theory are similarly flawed. Petitioners contend, for example, that the Rehabilitation Act proscribes distinctions among different types of handicaps and that the VA runs afoul of that standard by imposing only on veterans disabled by alcoholism (and drug dependence) the burden of proving that their disability was not the result of willful misconduct. The range of handicaps covered by the Rehabilitation Act is extensive, including a wide variety of conditions from mental illness, alcoholism and drug addiction, to all types of serious physical afflictions.[24] Obviously, different handicaps present different problems; no

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[24] In proposing the original regulations under the Rehabilitation Act, HEW referred to "the diversity of existing handicaps and the differing degree to which particular persons may be affected." 41 Fed. Reg. 20296 (1976). The regulations define "handicapped persons" in terms of "physical or mental impairments" which substantially limit one or more major life activities (or are regarded as doing so); "physical or mental impairment" includes "orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism." 28 C.F.R. 41.31(a) and (b)(1).

one would contend, for example, that a blind person and a paralyzed person must be treated in identical fashion. The Rehabilitation Act's general prohibition of discrimination against handicapped persons has never been construed to preclude government agencies from recognizing the differences among handicaps in determining how best to deal with them.[25] In each case, the nature of the particular handicap must be considered in determining what is required by the Act. See *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979) (deaf applicant for nursing school); *Doe* v. *New York University*, 666 F.2d 761 (2d Cir. 1981) (medical school applicant with history of mental illness).

These considerations are particularly relevant where the differing treatment of a particular handicap is required by statute. HEW's implementing regulations under the Rehabilitation Act of 1973 (applying to federally-funded programs) provide that "exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons" is not prohibited by the Act. 42 Fed. Reg. 22676, 22679 (1977), promulgating 45 C.F.R. 84.4 (c); see 28 C.F.R. 41.51(c) (HEW coordinating regulation for federally-assisted programs), 28 C.F.R. Pt. 39 (Department of Justice regulations), 38 C.F.R. 18.404(c) (VA regulation for federally-assisted programs), 52 Fed. Reg. 25124 (1987) (VA notice of proposed regulation for federally-conducted programs). This Court has "recognized [the HEW] regulations as

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[25] Indeed, Congress has itself enacted legislation providing benefits only to persons suffering from certain handicaps (*e.g.*, 29 U.S.C. 721(a)(5), 706(13) ("severe handicaps")), legislation that grants priorities only to persons with a specific disability (*e.g.*, Pub. L. No. 93-516, Tit. II, §§ 201-210, 88 Stat. 1622-1630 (blindness)), and legislation that expressly excludes persons with certain handicaps from eligibility (*e.g.*, Rehabilitation Act § 7(7)(B), 29 U.S.C. 706(7)(B), which, in specified circumstances, excludes persons who abuse alcohol or drugs from the definition of "handicapped person").

an important source of guidance on the meaning of section 504." *Alexander* v. *Choate*, 469 U.S. 287, 304 n.24 (1985); *School Bd. of Nassau County* v. *Arline*, No. 85-1277 (Mar. 3, 1987), slip op. 5; *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984); *Southeastern Community College* v. *Davis*, 442 U.S. 397, 413 (1979).

The HEW regulation is persuasive authority here. In the 1977 G.I. Bill amendment, Congress allowed handicapped persons to utilize educational benefits beyond ten years following their discharge, but restricted this special allowance to cases not involving "willful misconduct." [26] In doing so, Congress obviously focused on alcoholism and drug addiction, as evidenced not only by the Senate report's citation and approval of the VA's regulation (discussed at pages 30-31 *supra*), but its use of the same language that had already been interpreted in the context of disability pensions to include alcoholism and drug addiction. Thus, in 1977 Congress mandated separate treatment of drug and alcohol addiction under a "willful misconduct" standard; the HEW regulation and subsequent implementing regulations by other agencies properly recognize that it was never the intent of the Rehabilitation Act to alter existing statutes requiring separate treatment of different handicaps.

2. *There is a reasonable basis for treating alcoholism differently from other handicaps for purposes of veterans' benefits programs*

As we have explained, Congress directed the VA to apply the same "willful misconduct" standard to applicants for educational benefits extensions as to applicants for disability pensions. In assessing the reasonableness of the VA's interpretation of "willful misconduct," it is therefore necessary to consider the consequences of that

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[26] Given the limited resources available for veterans' benefits, Congress may reasonably place limitations on eligibility for such benefits, and it is Congress's prerogative to determine the manner in which priorities will be set and resources allocated. Cf. *McDonald* v. *Board of Elections*, 394 U.S. 802, 809 (1969).

interpretation in both contexts, yet petitioners do not explain how the Rehabilitation Act would require a change in the VA regulation interpreting the willful misconduct standard when that standard is applied to the educational benefits program but not when it is applied to disability pensions.[27]

Congress has clearly stated the reasons for its reluctance to grant disability pensions to alcoholics or drug addicts (S. Rep. 96-314, *supra*, at 25-26):

> In the context of [the disability compensation] program, the rate and duration of benefits depend directly upon the severity and duration of the disability. Thus, an individual receiving benefits under that program for alcoholism or drug addiction would have a strong financial incentive—in the form of a higher rate of compensation or the continuation of receipt of compensation—in the worsening or prolongation of the disability, both of which are to some extent within his or her control because they depend upon the amount, frequency, and duration of his or her consumption of alcoholic beverages or drugs.

One may differ, as a matter of policy, on the question whether extensions of the ten-year limitation on educational benefits for alcoholic veterans should be measured by the same standard as disability pensions. In its several recent efforts to enact legislation repealing the "willful misconduct" bar to educational benefits extensions while retaining it for disability pensions, the Senate Committee on Veterans' Affairs has urged that a different standard be used for each program on the ground that

---

[27] There is presently pending in the Third Circuit a case in which an alcoholic veteran is challenging the VA "willful misconduct" regulation as applied to claims for disability pensions on the basis of alcoholism. *Buck* v. *Veterans Administration*, No. 86-1656. The Third Circuit has stayed proceedings in that case pending this Court's decision in the present cases. Amicus Vietnam Veterans of America states (Br. 2-3) that one of its reasons for participating here is its participation in *Buck*.

educational benefits cases involve recovered alcoholics who should be rewarded for their recovery and encouraged to go to school (S. Rep. 96-314, *supra*, at 25-26):

> [T]he Committee would anticipate that the GI Bill educational assistance would have considerable value to the social and economic rehabilitation of veterans who have recovered from disabilities related to alcohol or drugs.

See also S. Rep. 98-604, *supra*, at 38-39. Congress's repeated rejection of that argument, however, has not been unreasonable. Under the statute, a qualified veteran—whether handicapped or non-handicapped, alcoholic or non-alcoholic—has ten years from the date of his discharge to utilize the G.I. Bill educational benefits. 38 U.S.C. 1662(a)(1). Persons in petitioners circumstances therefore had some meaningful access to the eductional benefit program. Cf. *Alexander* v. *Choate*, 469 U.S. at 301-306 (Rehabilitation Act is not violated by state Medicaid rule that had disparate impact on the handicapped). Moreover, eligible persons affected by alcoholism have available to them, during the delimiting period and thereafter, medical and rehabilitative services provided by the VA. 38 U.S.C. 1610. Even persons such as petitioners, if they are pursuing a full-time educational program when their delimiting period ends and if their request for an extension is denied, remain eligible for VA educational loans after the delimiting date (38 U.S.C. 1662(a)(2)(A)). In these circumstances, Congress might well conclude that ten years is time enough for a veteran to resolve a drug or alcohol problem—that it would be inappropriate, and would indeed communicate the wrong incentives, to tell veterans that there is no time limit on how long the VA will wait for them to resolve their problems and proceed with their publicly-funded education.

Just as this Court has concluded that conduct induced by alcoholism may be subject to deterrence through criminal sanctions, despite medical opinion labelling alcohol-

ism a "disease" (*Powell* v. *Texas*, *supra*), so too is it permissible for Congress to decide that the "disease" label does not require that alcoholism be categorized for all purposes with other disabilities less likely to involve elements of volition. Medical concepts developed in the context of diagnosis and treatment do not control the administrative decision of how best to interpret and further the purposes of the veterans' benefit statute (see note 14, *supra*).[28]

Moreover, even those medical writers who label alcoholism a "disease" for purposes of diagnosis and treatment, perceive that the label embraces a range of conditions including some in which volition plays a significant role that may be affected by appropriate incentives.[29] Even proponents of the "disease" concept recognize that an alcoholic may be able to exercise control over the amount he drinks, depending on the individual and on

---

[28] The medical community has found it useful to apply the "disease" label to alcoholism for reasons that have nothing to do with the administration of a benefits program. See Fingarette, *The Perils of* Powell: *In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 Harv. L. Rev. 793, 809-812 (1970). One researcher has summarized these reasons (Blume, *Public Policy Issues*, *supra*, at 186-187):

> Acceptance of alcoholism as a disease is the basis for public policies promoting early intervention; treatment; third-party coverage, such as public and private health insurance; services for families of alcoholic persons, with or without the participation of the alcoholic member; prevention services for children of alcoholic parents; and wide-ranging research into the biology, epidemiology, psychology, and sociology of alcoholism.

[29] See note 21, *supra*. "[M]any authorities flatly oppose [the "loss of control"] orientation, and, while recognizing that there may be physical factors at work, consider it essential that 'there is a whole series of voluntary actions in the act of drinking; and there has to be a choice involved.'" Fingarette, *supra*, 83 Harv. L. Rev. at 808 n.66; see DSM-III at 169 (diagnostic criteria for alcohol abuse include "continuation of drinking despite a serious physical disorder that the individual knows is exacerbated by alcohol use").

the professional or other support he or she receives.[30] Indeed, even the view expressed by some medical commentators, that alcoholism represents a physical condition, either inherited or acquired, does not negate an

---

[30] A survey of the literature in 1970 concluded that even authorities "who use 'loss of control' language ultimately introduce serious qualifications. * * * [W]e are told not that the alcoholic has *no* control of his drinking, but that he has greater or lesser control, *widely* varying in degree according to the circumstances and the individual." Fingarette, *supra*, 83 Harv. L. Rev. at 802 (emphasis in original). More recent authority, cited in this case as supporting the "disease" concept, bears out this description. Thus, one writer states (Wolf, *Alcohol and Health: The Wages of Excessive Drinking*, in *Alcoholism and Related Problems: Issues for the American Public* 29 (1984), cited by amicus National Association of Addiction Treatment Providers (Br. 11 n.6)):

> There has been much dispute, but no consensus, about the various parts played by genetic inheritance, the social pressures, special features of individual growth and maturation, and the insidious effects of ethanol itself in the cause of alcoholism. Apparently, all are pertinent, and the behavioral characteristics of alcoholics are partly innate and partly shaped by learning or practice.

See also S. Zimberg, *supra*, at 8:

> Alcoholism can best be considered a disease with a multiple causality. The factors believed to contribute to the development of alcoholism are both psychological and sociocultural, along with physiological factors which probably operate on a genetic basis.

The "disease" approach to alcoholism has itself been substantially revised (Kissin & Hanson, *The Bio-psycho-social Perspective in Alcoholism*, in *Alcoholism and Clinical Psychiatry* 12 (J. Solomon ed. 1982) (footnote omitted)):

> In the old disease concept of alcoholism as promulgated [by] Jellinek and expanded upon by both psychoanalysis and Alcoholics Anonymous, the alcoholic was seen as more or less preordained to become alcoholic and to remain quintessentially alcoholic even after he became abstinent. * * * [T]he old disease concept of alcoholism has largely been discarded.
>
> In the new approach to the disease concept a variety of influences—physiological, psychological, and social—are seen as contributing to the development of problem drinking * * *.

element of volition: "'physical' hypotheses do not claim that there is no volition in the alcoholic's excess drinking but that, partly because of physical abnormality, the alcoholic is one who faces a choice which is (increasingly) more difficult than for most people." Fingarette, *The Perils of* Powell: *In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 Harv. L. Rev. 793, 805 (1970).[31]

Petitioners and the amici criticize the court of appeals' decision in *McKelvey* for separating the conduct of an alcoholic from his underlying condition, allowing the VA to label the conduct of excessive drinking as "willful misconduct." In fact, however, this approach coincides with a widely used and frequently successful approach to the treatment of alcoholics (Fingarette, *supra*, 83 Harv. L. Rev. at 807 n.64):

> Alcoholics Anonymous maintains that alcoholism is a "disease," but not that drinking is involuntary. On the contrary, the entire approach in Alcoholics Anonymous is to enlist the voluntary cooperation of the alcoholic, to appeal to him on moral-religious-pragmatic grounds to voluntarily abstain

---

[31] The studies cited by amici to support the genetic component of alcoholism concede that the genetically-predisposed alcoholic retains volition in the sense of being susceptible to outside authorities telling him he should not drink (Bohman, *et al.*, *Maternal Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Adopted Women*, 38 Arch. Gen. Psychiatry 965 (1981), cited by Amicus National Council on Alcoholism, Inc. (Br. 25 n.13); see *Cloninger, supra*, at 867):

> [T]he critical importance of sociocultural influences in most alcoholics suggest that major changes in social attitudes about drinking styles can change dramatically the prevalence of alcohol abuse regardless of genetic predisposition.

The most recent study cited by the amici also states that even among genetically predisposed individuals, "personal values and intentions" play a role in excessive drinking. Peele, *The Implications and Limitations of Genetic Models of Alcoholism and Other Addictions*, 47 J. Studies on Alcohol 63 (1986).

> from drinking, and to engage in reciprocal self-help along these lines with his brother AA members.[32]

This approach is also compatible with recent studies, which stress that the "disease" concept of alcoholism is perfectly consistent with an insistence that the alcoholic assume responsibility for his or her own conduct (G. Vaillant, *supra*, at 299):[33]

> In conveying the concept that alcoholism is a disease to the patient, it is important also to underscore that alcoholism is a disease that is highly treatable,

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[32] The AA treatment has also been described as a way of "transform[ing] externalization of responsibility into self-responsibility." G. Vaillant, *supra*, at 204; see S. Zimberg, *supra*, at 118 ("The only requirement for AA membership is a desire to stop drinking.").

" 'There is no longer any question that Alcoholics Anonymous has been responsible for the sobriety of more alcoholics than any other method, social, religious, or medical. Psychiatrists are now "believers." ' " M. Hayman, *Alcoholism—Mechanism & Management* 174-175 (1966), quoted in Fingarette, *supra*, 83 Harv. L. Rev. at 807 n.64. One of the studies cited by amici acknowledges that while the data are inconclusive, AA treatment as well as "personal resolve" has helped cure many alcoholics (West, *Alcoholism and Related Problems: An Overview*, in *Alcoholism and Related Problems: Issues for the American Public* 17 (1984)):

> AA is known to have helped hundreds of thousands of alcoholics to maintain sobriety. Other alcoholics, even without the help of AA, have also been able to remain sober through personal resolve reinforced by family support, religious conversion experiences, psychotherapeutic intervention, and effective contact with medical facilities and health personnel.

[33] The role of self-responsibility in the cure of alcoholism is also stressed in S. Zimberg, *supra*, at 67-69:

> The patient should be told that the therapist, the patient's spouse, or anyone else cannot stop a problem drinker from drinking. Only the patient's own efforts, utilizing the treatment tools, will result in a recovery from the problem drinking.
>
> * * * * *
>
> The patient's recovery ultimately depends on his weighing the benefits of sobriety against the "benefits" of drinking. Only the patient can make this determination.

> but that like the treatment of diabetes, treatment of alcoholism will require great responsibility from the patient.

Even ardent advocates of the "disease" concept recognize that a person with the genetic predisposition to alcoholism may exercise personal responsibility and choose not to drink (Talbott, *Alcoholism and Other Drug Addictions: A Primary Disease Entity*, 75 J. Med. Ass'n. Ga. 490, 493 (1986), cited by amici American Medical Association, *et al.* (Br. 13 n.7)):

> There are millions of people in this country who have the genetic predisposition, but who for cultural, health, personal, or religious reasons will not abuse, so they never manifest the disease.

In sum, Congress decided to apply a "willfulness" test to the participation of alcoholics in veterans' benefits programs. That decision is consistent with medical authority, which recognizes that many alcoholics are not completely helpless but retain a significant degree of volition. In its regulations and policies implementing the statute, the VA has acted reasonably in focusing the "willfulness" determination on the presence or absence of an underlying psychiatric disorder or a derivative organic disorder. The VA's approach—which Congress has endorsed—makes a reasonable distinction among types of handicaps, based on the "willfulness" test and substantial medical authority. It is therefore perfectly consistent with the Rehabilitation Act.[34]

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[34] This Court's decision in *School Bd. of Nassau County* v. *Arline*, *supra*, does not require the conclusion that the Rehabilitation Act prevents the VA from carrying out the "willful misconduct" test for G.I. Bill extensions and disability pensions imposed by the veterans' benefits statute. The Court's opinion in *Arline* concluded (slip op. 9) that the purpose of the Rehabilitation Act is to assure that handicapped individuals are not denied benefits because of "prejudiced attitudes or * * * ignorance" or "society's accumulated myths and fears" (*ibid.*). In this case, unlike *Arline*, the VA is implementing a specific congressional decision to utilize a "willful

CONCLUSION

The judgments of the courts of appeals should be affirmed.

Respectfully submitted.

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misconduct" standard; and it has done so in a manner that accepts psychiatric testimony in individual cases to determine whether a psychiatric disorder is involved in the particular case. Thus, the reconciliation here of the Rehabilitation Act with a more specific congressional directive—a matter not addressed in *Arline*—is fully consistent with the Court's rationale in that case.

APPENDIX

38 U.S.C. 211(a) provides:

> On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

Section 203 of the G.I. Bill Improvement Act of 1977, Pub. L. No. 95-202, Tit. II, 91 Stat. 1439, 38 U.S.C. (Supp. II 1978) 1662 provided, in pertinent part:

> (a)(1) No educational assistance shall be afforded an eligible veteran under this chapter beyond the date 10 years after the veteran's last discharge or release from active duty after January 31, 1955; except that, in the case of any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct, such veteran shall, upon application, be granted an extension of the applicable delimiting period for such length of time as the Administrator determines, from the evidence, that such veteran was prevented from initiating or completing such program of education.
>
> * * * * *
>
> (e) No educational assistance shall be afforded any eligible veteran under this chapter or chapter 36 of this title after December 31, 1989.

38 C.F.R. 3.301(c)(2) provides:

> *Alcoholism.* The simple drinking of alcoholic beverage is not of itself willful misconduct. The deliberate drinking of a known poisonous substance or under conditions which would raise a presumption to that effect will be considered willful misconduct. If, in the drinking of a beverage to enjoy its intoxicating effects, intoxication results approximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct. Organic diseases and disabilities which are a secondary result of the chronic use of alcohol as a beverage, whether out of compulsion or otherwise, will not be considered of willful misconduct origin.

Veterans Administration Manual M21-1 provides:

> 50.40 DISABILITY OR DEATH FROM USE OF ALCOHOL
>
> a. *Alcohol Per Se.* Alcoholism, in and of itself, is a misconduct situation.
>
> (1) As a primary condition, it may not be accepted as a basis for granting or increasing monetary benefits under the laws administered by the VA. However, if alcoholism is secondary to and a manifestation of a psychotic, psychoneurotic or psychophysiologic disorder, consider the alcoholism part and parcel of the disability and rate as one disease entity, e.g., schizophrenia with alcoholism.

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Nos. 86-622 and 86-737

IN THE

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THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, and VETERANS' ADMINISTRATION,

Respondents.

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REPLY BRIEF FOR PETITIONERS

Petitioners Eugene Traynor and James P. McKelvey submit this brief in reply to the arguments advanced by respondents. The government argues that 38 U.S.C. § 211(a) (1982) precludes the federal courts from considering whether the Veterans' Administration's "willful misconduct" regulation discriminates

against the handicapped in violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982). The United States also argues that even if § 211(a) does not bar review, the willful misconduct regulation is not discriminatory.

These arguments should be rejected, for the reasons set forth below and in petitioners' opening brief.

I. SECTION 211(a) DOES NOT PRECLUDE THE FEDERAL COURTS FROM DETERMINING WHETHER THE VETERANS' ADMINISTRATION'S WILLFUL MISCONDUCT REGULATION VIOLATES § 504 OF THE REHABILITATION ACT

A. Neither The Language Of § 211(a) Nor The Legislative History Supports The Government's Argument

1. The Language of § 211(a) Permits Review

The government asserts that the plain language of § 211(a) precludes judicial review of petitioners' challenge under the Rehabilitation Act to a Veterans' Administration ("VA") regulation of broad and binding application.[1] Res. Br. at 12-13. It relies for this conclusion upon a cursory reading of § 211(a).[2] In

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[1] The government repeatedly errs in characterizing petitioners' lawsuits as mere disputes about the VA's determination of individual benefit claims. In fact, petitioners are seeking review of the VA's failure—and, indeed, refusal—to comply with a federal statute, the applicability of which is undisputed.

[2] The government's reliance on Lindahl v. OPM, 470 U.S. 768 (1985), is misplaced. Res. Br. at 13. In *Lindahl*, the Court noted that "when Congress intends to bar judicial review altogether, it typically employs language far more unambiguous and comprehensive than" the language of the statute in question in *Lindahl*, citing § 211(a) as an example of a statute with a clearer bar to review. *Id.* at 779-780. At most, this citation stands for the proposition that § 211(a) is broader than the statute at issue

contrast, petitioners have explained how a full and fair reading of the statutory language permits review in these circumstances. See Pet. Br. at 34-37.

Section 211(a) provides that "decisions of the Administrator *on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans* . . . shall be final and conclusive." (Emphasis added.) Thus, review is barred only where a court would be required to substitute its own judgment for the VA's concerning questions of law or fact that arise under any law (1) administered by the VA that (2) provides benefits for veterans. Petitioners' lawsuits plainly are outside this bar.

First, as noted by Judge Kearse in her dissent in *Traynor*, the VA does not administer § 504 of the Rehabilitation Act. *See* Pet. Br. at 35 n.23.[3] Moreover, § 504 does not provide benefits to veterans—rather, it prohibits discriminatory treatment of the handicapped, including alcoholics, in all federal programs, not just those of the VA.[4]

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in *Lindahl*, and that § 211(a) bars review in certain circumstances. Petitioners have never claimed otherwise. The Court's decision in Johnson v. Robison, 415 U.S. 361 (1974), and four court of appeals decisions allowing review of non-constitutional challenges to VA determinations confirm that § 211(a) does not bar review in all circumstances. *See* Pet. Br. at 46 & n.31.

[3] The Justice Department administers the Rehabilitation Act pursuant to Executive Order No. 12,250, *reprinted in* 42 U.S.C. § 2000d-1 (1982).

[4] If the government's view of § 211(a) were accepted, § 211(a) would preclude review of any VA regulation, regardless of its inconsistency with federal laws of general applicability. For example, § 211(a) would bar courts from reviewing claims of mi-

The government contends, however, that many veterans claiming a "disability" under a veterans' benefits statute could also claim to be "handicapped" under the Rehabilitation Act. As a result, the government argues that a ruling in petitioners' favor would allow any veteran to avoid the effect of § 211(a) merely by including a Rehabilitation Act claim in his or her complaint. Res. Br. at 23-24.

This concern is frivolous. The Court noted in *Johnson v. Robison* that § 211(a) precludes review of decisions "made by the Administrator in the . . . application of a particular provision of the [veterans' benefits] statute to a particular set of facts." 415 U.S. at 367. If a complaint alleging violation of a non-VA statute actually questions only the VA's application of the laws and regulations it administers to a particular set of facts, a decision in favor of petitioners would not authorize judicial review. But where, as here, the challenge is to the VA's failure or refusal to comply with a statute of general applicability, thus raising a genuine issue under a statute not administered by the VA, review would and should be permitted. Once that legal challenge is resolved, it would be for the VA to apply the corrected policy on a case-by-case basis in light of the facts raised by each veteran's case.

2. The Available Evidence of Congressional Intent Supports Judicial Review

The government also contends that the legislative history of § 211(a) supports its argument that the courts cannot hear these cases. Yet the "legislative history" cited by the government, principally a reci-

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ample, § 211(a) would bar courts from reviewing claims of minority veterans that VA regulations violate Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1982).

tation of the language of § 211(a) in its various iterations, is unilluminating. The language of the statute has changed over the years, but it has never supported the government's sweeping assertion that Congress intended to bar review even of "questions arising under other statutes [than those administered by the VA]." Res. Br. at 14. Bars to judicial review are disfavored. *See, e.g., Bowen v. Michigan Academy of Family Physicians*, 106 S.Ct. 2133, 2135-36 (1986). Accordingly, if the government's position were correct, one would find support in the history of § 211(a) for the proposition that VA regulations are not subject to review to determine whether they violate laws of general applicability.[5]

Instead, what little legislative history exists supports judicial review. Pet. Br. at 39-45. The VA's own pronouncements have been particularly instructive. The VA Administrator told the Congress in 1984: "VA regulations should be, and are, reviewable in the

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[5] In Gott v. Walters, 756 F.2d 902, 908 (D.C. Cir.), *vacated and remanded with order to dismiss*, 791 F.2d 172 (D.C. Cir. 1985) (en banc), Judge Scalia noted that "the language [of 211(a)] dates back to . . . an era in which the adoption of principles governing adjudication *by rule* was rare (and thus unlikely to be specifically addressed in such a statute)." Given this, Congress could hardly have intended to preclude the review of regulations when it enacted § 211(a).

A recent commentator, arguing that review should be permitted in these cases, has noted that § 211(a) was enacted at a time when state-created benefits were viewed as mere "gratuities," not property rights. As such, veterans' benefits could be withdrawn without due process of law. *See* Reisch, "211 in Progress: Must the Veterans Administration Comply with Federal Law," 40 Stanford L. Rev. at 323, 324-25 (1987) (student author) (discussing scope of § 211(a) bar to review).

Federal courts." *See* Pet. Br. at 43. The government discounts this testimony as merely "snippets of subsequent legislative materials" that should be given no weight. Res. Br. at 18 n.8. However, the Court has repeatedly recognized that the view of the affected agency is a significant source for understanding Congressional intent.[6] *See, e.g., Bell v. New Jersey*, 461 U.S. 773, 787 (1983); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8, 667-672 (1980). This is particularly true here, where the agency told Congress that review of regulations was available, and Congress relied on the VA's statements in declining to amend § 211(a).[7] The VA's stated views to Congress should therefore be accorded significant weight in resolving these issues. *See* Pet. Br. at 43-45.

B. Judicial Review Furthers The Goals Of The Rehabilitation Act And Will Not Thwart The Objectives Of § 211(a)

1. Review Is Necessary To Ensure That The Requirements Of § 504 Are Honored

The underlying premise of the government's argument is that the VA is competent to review its own actions under the Rehabilitation Act and other

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[6] The government recognizes this point, for it argues that the VA Administrator's view concerning the legality of the willful misconduct regulation is entitled to "considerable deference." Res. Br. at 32. *See* note 16 *infra*.

[7] *See* Reisch, *supra*, 40 Stanford L. Rev. at 351 & nn.149-150. Despite its conciliatory statements to Congress that § 211(a) permits review of regulations, the VA has argued the jurisdictional issue inconsistently to the Courts of Appeals. *See* Pet. Br. at 9 and 12-13 (jurisdiction challenged in *Traynor* but initially conceded in *McKelvey*); Tinch v. Walters, 765 F.2d 599 (6th Cir. 1985) (jurisdiction not challenged).

generally-applicable federal statutes, and that § 211(a) withdraws from the federal courts the authority to determine whether a VA regulation violates such statutes. This is an astonishing argument in light of the facts of these cases.

In *Traynor*, the Board of Veterans Appeals explicitly declined to consider whether its decision on Mr. Traynor's request for benefits was proper in light of § 504 of the Rehabilitation Act. 791 F.2d at 233 (Traynor Cert. Pet. 35A-36A); *see* Pet. Br. at 32. In *McKelvey*, raising the Rehabilitation Act issue before the Board of Veterans Appeals would have been futile. As the government stated in its opening brief to the D.C. Circuit on Mr. McKelvey's appeal,

> "We are not pursuing the question of jurisdiction on this appeal, because we do not believe that 38 U.S.C. § 211(a) can be applied to the claim under the Rehabilitation Act . . .. We do not read 38 U.S.C. § 211(a) to preclude judicial review of a point that the Veterans Administration never considered and, under existing regulations, probably had no authority to consider."

See Pet. Br. at 32-33.

Thus, petitioners never had a hearing before the VA on the question of whether the willful misconduct regulation violates § 504 of the Rehabilitation Act. The Board of Veterans Appeals believed it had no authority to provide such a hearing, and until quite late in the *McKelvey* litigation, the United States concurred. Under these circumstances, divesting the courts of jurisdiction would exempt the VA from the

rule of law and leave petitioners without any forum to raise their civil rights claims.[8]

2. Judicial Review Will Not Impair The Uniformity Of VA Decisions

The government contends that reversal of the decisions below would foster inconsistency by allowing judicial review of policy interpretations announced by regulation but not those announced through adjudication. Res. Br. at 21-22. This contention has no merit. The VA develops very little policy by adjudication. VA regulations state explicitly that "[c]onclusions reached in individual cases . . . will not be followed as precedents." 38 C.F.R. § 3.101 (1986). Instead, VA benefits determinations are guided by regulations and policy manuals that reiterate and implement the requirements of those regulations. *See, e.g.*, VA Manual M21-1, § 14.04 (JA at 167). Thus, allowing review here produces a rational scheme for ensuring VA compliance with generally-applicable law.[9]

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[8] It is one thing to trust that an agency's case-by-case determinations will comply with agency rules, but it is quite another to give an agency unreviewable discretion to issue or maintain rules that are facially inconsistent with laws passed by Congress. The latter position—urged by the government here—undermines the rule of law by authorizing agencies to disregard with complete impunity their obligations under federal statutes.

[9] The government notes the First Circuit's apparent concern in Paluca v. Secretary of Labor, 813 F.2d 524 (1st Cir. 1987), that permitting review of generally-applicable regulations but not individual cases would produce an "absurd result" because the court could not ensure that its directive was followed in individual cases. *See* Res. Br. at 22 n.12. This is unpersuasive, and it fails to justify the abdication of the court's responsibility to

Equally meritless is the government's contention that allowing review of regulations would have the negative effect of encouraging the VA to avoid rule-making altogether. Res. Br. at 22. There has been no evidence of such a trend despite the fact that review has been available in several circuits for a number of years. Moreover, the incentives for the VA to continue to operate through regulations will remain strong despite the availability of judicial review in the narrow circumstances of these cases.[10]

3. Judicial Review Will Not Overburden the Courts

The government asserts, without justification, that a decision allowing review would overburden the courts with litigation. It supports this policy argument only by counting the number of pages of VA regulations in the Code of Federal Regulations. Res. Br. at 19-21. This concern is not only speculative, but also must be rejected on the basis of the VA's own

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ensure that general rules governing individual cases are legally correct.

[10] The government quotes from this Court's decision in Rose v. Rose, 107 S.Ct. 2029 (1987), to support its argument that permitting review would result in non-uniform VA decisions. In fact, *Rose* supports petitioners' argument. Rose held that § 211(a) did not divest a state court of jurisdiction in a contempt proceeding brought against a veteran charged with failing to make child support payments out of the proceeds of his VA disability benefits. The Court stated that the "interest in uniform administration of veterans' benefits focuses . . . on the technical interpretations of the statutes granting entitlements, particularly on the definitions and degrees of recognized disabilities and the application of the graduated benefit schedules." *Id.* at 2035. These cases ask the Court to consider the legality of a broad and binding regulation having nothing to do with technical VA determinations.

experience. Although challenges by veterans to VA regulations have been permitted for a number of years in four circuits, only a handful of cases have been brought. *See* Pet. Br. at 46 n.32. This is hardly an overwhelming burden for the courts, and a decision by the Court in petitioners' favor will not open the floodgates.[11]

II. THE WILLFUL MISCONDUCT REGULATION VIOLATES § 504 OF THE REHABILITATION ACT

A. Section 504 Of The Rehabilitation Act Prohibits Discrimination On The Basis Of Alcoholism

The government contends that, under petitioners' theory, "the dispositive issue in the case is whether alcoholism is a disease." Res. Br. at 26. This is simply incorrect. The dispositive issue is whether the VA may ignore Congress' determination that alcoholism is a handicap,[12] and its mandate that alcoholics must not be the victims of discrimination because of their handicap. Thus, the issue is not a medical one—whether alcoholism is a "disease"—but a legal one: may the VA ignore federal law and treat alcoholics in a manner prohibited by the Congress. The answer is obviously no, and a straightforward analysis under § 504 of the Rehabilitation Act demands the conclusion that the willful misconduct regulation is improperly discriminatory.

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[11] *See* Reisch, *supra*, 40 Stanford L. Rev. at 352-355.

[12] In addition to its determination that alcoholism is a handicap, Congress has also determined that "alcoholism is an illness requiring treatment and rehabilitation." Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 42 U.S.C. § 4541(a)(8) (1982).

As the government concedes, alcoholism is a handicap for purposes of the Rehabilitation Act.[13] *See* Res. Br. at 33; *see also* Pet. Br. at 20-21. Accordingly, the Court must consider (1) whether petitioners are "otherwise qualified" for the program of benefits from which they have been excluded (the government does not dispute this); (2) whether petitioners have been excluded "solely" because of their handicap (the government admits that petitioners, and all veterans whose only disability is alcoholism, are barred from receiving delimiting date extensions solely because they are alcoholics); and (3) whether the program from which petitioners have been excluded is subject to § 504 (the government concedes this). Res. Br. at 36-37. In sum, the government has not challenged any element of petitioners' § 504 claims. Therefore petitioners must prevail.

B. Attempts To Justify The Willful Misconduct Regulation Are Neither Relevant Nor Persuasive

The government makes a number of unpersuasive arguments in an effort to justify its discriminatory regulation. Petitioners will briefly discuss the reasons why these arguments should be rejected.

1. The Willful Misconduct Regulation, Which Is Rooted In The Era Of Prohibition, Violates The Basic Mandate Of The Rehabilitation Act

The government argues that the VA's classification of alcoholism as willful misconduct is long-standing

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[13] The VA distinguishes primary alcoholism, which is not accompanied by an underlying psychiatric condition, from secondary alcoholism, which is, by denying delimiting date extensions only to primary alcoholics. Because the Rehabilitation Act recognizes all alcoholism, whether primary or secondary, as a handicap, petitioners need not address the VA's misuse of these distinctions. *See* note 16 *infra*.

and therefore entitled to deference. Res. Br. at 27-30. Petitioners concede that the "willful misconduct" regulation has a long history; indeed, the archaic attitude toward alcoholism that it reflects is precisely the problem. The regulation's conclusive classification of alcoholism as willful misconduct dates from the era of Prohibition, when little was known about the nature of alcoholism, and when alcoholism was considered merely immoral behavior and a sign of weakness.

With the passage of the Rehabilitation Act in 1973, Congress determined that persons with handicaps should not be discriminated against "because of the prejudiced attitudes or the ignorance of others." *School Board of Nassau County v. Arline*, 107 S.Ct. 1123, 1129 (1987). The central purpose of the Act is to ensure that decisions about handicapped individuals, including alcoholics, will be made not on the basis of stereotypes and conclusive presumptions—such as those reflected in the VA's "willful misconduct" regulation—but on the basis of a careful, individualized assessment of relevant information about each person's handicap and qualifications to participate in the program in question. As the Court noted in *Arline*, "[t]he Act is carefully structured to replace . . . reflexive reactions to actual or perceived handicaps with actions based on reasoned and medically sound judgments." *Id.* at 1129.

The willful misconduct regulation defeats this purpose by requiring that all decisions about veterans whose handicap is alcoholism be based on the conclusive presumption that alcoholism is caused by misconduct—a presumption that, as amici point out, flies in the face of current medical knowledge about the etiology and nature of this illness. The regulation bars

all veterans handicapped by alcoholism from making any showing that their handicap was not caused by misconduct, and thus preemptorily denies them extensions of time in which to use their educational benefits.

The government disingenuously asserts, however, that in amending 38 U.S.C. § 1662(a)(1) (1982) in 1977 to allow extensions of time in which to use educational benefits, Congress approved of the VA's long-standing interpretation of alcoholism as willful misconduct. Res. Br. at 30-31. Its only support for this conclusion is language from a Senate Committee report suggesting that, in determining whether a disability resulted from "willful misconduct," the "same standards [should] be applied as are utilized in determining eligibility for other VA programs."

There is no indication, however, that the Committee or the Congress considered the substance of the VA's regulations.[14] This is particularly significant here because in 1977, the time of the amendments on which the government relies, § 504 of the Rehabilitation Act *did not apply* to the VA educational benefits program. Section 504 only became applicable in 1978, when Congress first extended the proscription against discrimination to all federal agencies, without any indication that the VA educational benefits program

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[14] The government calls the issue of alcoholism "technical and complex," and suggests that the VA has expertise in the area. Res. Br. at 31. This "expertise" is not explained, and the record is utterly barren of any indication that the VA exercised any medical or other technical judgment in deciding that alcoholism is willful misconduct. Indeed, the effect of the willful misconduct regulation was to preclude the use of any such expertise on the part of the VA in these cases.

should be immune from the full impact of § 504. The government's suggestion that a brief reference in a Senate Committee report made when § 504 did not even apply mandates disparate treatment for a particular category of handicapped individuals is absurd.

2. Enforcing § 504 Will Not Repeal The Statute Permitting Extensions Of Delimiting Dates

The government suggests that reversal of the decisions below will impliedly repeal the statutory provision permitting extensions of time in which to use VA educational benefits. Res. Br. at 32-35. The government reaches this conclusion by acting as if the willful misconduct *regulation* is in fact synonymous with the delimiting date extension *statute*, and by attempting to create a conflict between two statutes when there is none. Res. Br. at 32. This effort must fail.

The willful misconduct regulation discriminates against alcoholics in violation of § 504 of the Rehabilitation Act. Judicial recognition of the regulation's unlawfulness would have absolutely no effect on the *statute* authorizing extensions only for veterans whose disabilities are not the result of willful misconduct. The VA would still be able to make individualized determinations of willful misconduct under the statute; it simply could not make blanket determinations that a handicapping condition such as alcoholism is *per se* willful misconduct.[15]

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[15] The D.C. Circuit in *McKelvey* suggested that the VA could create an irrebuttable presumption that alcoholism is "willful misconduct," stating that "[i]t is no discrimination . . . to establish for various disabilities the sorts of procedures that are distinctively appropriate." 792 F.2d at 203. But the willful mis-

The government suggests, however, that its regulation is merely a way of "making reasonable distinctions among types of handicaps." Res. Br. at 33. Thus, respondents argue that "even if one accepts the disease conception of alcoholism and considers only those veterans whose alcoholism is disabling, that would not necessarily preclude scrutiny of the veteran's conduct or his volition as a contributing cause of his disability." *Id.* This general statement has no conceivable relevance to the VA's classification of alcoholics. These cases demonstrate that the VA does not scrutinize an alcoholic veteran's conduct or volition. Instead, once a veteran is identified as an alcoholic, that ends the inquiry. Alcoholic—and thus—handicapped veterans are presumed conclusively to have engaged in willful misconduct, and are denied access to educational benefits because of their condition. This is nothing more than impermissible discrimination on the basis of handicap.[16]

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conduct regulation is substantive, not procedural, and determines conclusively that persons handicapped by alcoholism have engaged in willful misconduct, regardless of whether this presumption is factually incorrect in an individual case. This presumption, no matter how explained or rationalized, is discriminatory.

[16] The VA's attempt to rationalize the willful misconduct regulation must be rejected, for several reasons. First, "[i]t is an axiom of administrative law that an agency's explanation of the basis for its decision must include 'a 'rational connection between the facts found and the choice made.' ' " Bowen v. American Hospital Ass'n, 106 S.Ct. 2101, 2112 (1986). The briefs of amici demonstrate that the VA's classification is not medically sound, and therefore the regulation is irrational. Second, there is no reason to accord any deference to the VA's proffered rationale. In *Bowen* the Court noted that the views of most federal agencies with respect to § 504 are not "predicated on expertise,"

The government nevertheless contends that such discrimination is acceptable because of legislative events occurring after 1978, all of which reflect widespread dissatisfaction with the VA's position here and concern about whether that position was supported by law. In 1980, in deciding not to adopt a statutory provision that would have specifically overridden the VA's regulation in the circumstances raised by these cases, the Joint Explanatory Statement of the House and Senate Veterans Affairs Committees noted:

> By deleting the Senate provision [which would have made clear that delimiting date extensions were available to recovered alcoholics], the Committees are taking no position as to whether such a provision is necessary in order to authorize the VA to make favorable determinations regarding GI Bill delimiting date extensions based on disability in the cases of veterans or eligible persons who have recovered from alcohol or drug dependence or abuse disabilities.

Veterans Rehabilitation and Education Amendments of 1980, Joint Explanatory Statement, [1980] U.S. Code Cong. & Ad. News 4617, 4635. This statement is striking, for it indicates that the Committees believed that no revision of the statutory willful misconduct test was necessary to allow the VA to grant extensions to veterans handicapped by alcoholism.

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and thus not entitled to deference. 106 S.Ct. at 2120 n.30. Finally, § 504 demands not just a reasonable basis for discriminatory regulations, but a "*substantial* showing that [an agency's] regulations are justified." Traynor v. Walters, 606 F. Supp. 391, 400 (S.D.N.Y. 1985) (emphasis added); *see also* Brief Amicus Curiae of The National Council on Alcoholism at 43 n.23.

3. Enforcing § 504 Will Not Have Adverse Consequences For The Administration of VA Programs

The government states that "in assessing the reasonableness of the VA's interpretation of 'willful misconduct,' it is . . . necessary to consider the consequences of that interpretation" in the context not only of educational benefits extensions but also of disability pensions. Res. Br. at 40-41. This explicit invitation to consider policy issues properly left to Congress, even if it were proper, has no merit.

The government suggests that the availability of extensions would create an incentive for alcoholic veterans to continue drinking. This argument defies common sense. In any event, the amount of educational benefits is determined not by the level of disability but by the length of service. 38 U.S.C. § 1661(a) (1982). Continued drinking would have no effect on the amount of benefits.

The financial incentives may be different with respect to disability benefits, but that program, which is subject to a separate VA regulatory regime, is not at issue here. Moreover, the government's concern is misplaced, for if a veteran continued to drink in order to receive or enhance disability benefits, that might properly be classified as "willful misconduct" that would allow the denial of benefits. In any event, if a decision for petitioners were perceived to have an adverse impact on the disability benefit program, Congress could act to correct that impact, much as it limited the effect of § 504 of the Rehabilitation Act in the context of employment of active alcoholics and drug abusers. 29 U.S.C. § 706(8)(B) (1982).

CONCLUSION

For the reasons discussed in petitioners' opening brief and in this reply brief, the Court should reverse the decisions of the Second Circuit in *Traynor* and the D.C. Circuit in *McKelvey*, and invalidate the VA's willful misconduct regulation because it conflicts with § 504 of the Rehabilitation Act.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EUGENE TRAYNOR,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, and VETERANS' ADMINISTRATION,

Respondents.

JAMES P. McKELVEY,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS, and VETERANS' ADMINISTRATION,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE NATIONAL COUNCIL ON ALCOHOLISM, INC.

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ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE SECOND CIRCUIT AND THE
DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL COUNCIL ON ALCOHOLISM, INC.

STATEMENT OF INTEREST[1]

The National Council on Alcoholism (NCA) is a nation-wide independent, non-profit organization whose mission is to combat alcoholism and related problems by encouraging the prevention and treatment of this disease, by increasing public awareness and understanding about its nature and consequences, and by promoting the development of sane and humane public policies for resolving the many tragic problems that alcoholism creates in this society.[2]

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[1] Pursuant to Rule 36 of the Supreme Court Rules, written consent to file this brief has been obtained by counsel of record for all parties. The letters of consent have been filed with the Clerk of Court.

[2] NCA's major programs include alcoholism prevention and education, public information, public policy advocacy, conferences and publications. NCA's network of 190 state and local nonprofit affiliates conduct similar activities in

(continued...)

The cases of Traynor v. Turnage and McKelvey v. Turnage present issues of paramount concern to NCA. Since its founding in 1944, NCA has sought to end the stigma that historically has been attached to alcoholism, and to foster understanding of the fact that alcoholism is neither misconduct nor a moral failing, but a complex and insidious medical condition that can and must be treated. NCA has long supported all necessary efforts to enhance the effective treatment of the disease of alcoholism and ensure the fair treatment of alcoholics -- especially

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[2](...continued)
their areas and provide information and referral services to families and individuals seeking help with an alcohol or other drug problem. NCA sponsors National Alcohol Awareness Month in April and National Fetal Alcohol Syndrome Awareness Week. NCA also conducts the National Alcoholism Forum, the nation's oldest general-interest conference on alcoholism.

those who have successfully arrested their illness.

The Veterans' Administration (VA) regulation whose classification of alcoholism is at issue in these cases strikes at the heart of NCA's 43-year effort to dispel the myths and misunderstanding that persist in some quarters about the causes and nature of alcoholism.

By classifying "primary" alcoholism as "willful misconduct", the VA regulation (38 U.S.C. § 3.301(c)(2)) categorically excludes an entire group of veterans who have successfully recovered from alcoholism from participating in the VA's educational assistance benefits program. (See 38 U.S.C. § 1662(a)(1)). This archaic, erroneous and stigmatizing classification is in direct conflict with both current medical understanding and the clear congressional mandate not to

discriminate on the basis of handicap, contained in § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982).

The VA's regulation reflects precisely the sort of misperceptions about alcoholism that in the past have posed the worst barriers to the effective prevention and treatment of this disease. Its continuing existence thwarts the successful treatment and rehabilitation of alcoholics, and throws into jeopardy the legal rights of persons and families who have already suffered too much from alcoholism and its devastating consequences.

For these reasons, NCA files this brief amicus curiae. Its purpose is to urge the Court to recognize the true nature of alcoholism, as reflected in two important Acts of Congress, and to give real meaning to the nondiscrimination mandate of § 504 as it affects those

veterans whose handicap is a history of alcoholism successfully overcome.

SUMMARY OF ARGUMENT

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I chose it to mean -- neither more nor less."
>
> "The question is," said Alice, whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be the master, that is all".[3]

Alcoholism is a disease. This fact has been recognized by all major national (and international) medical, psychiatric, alcoholism treatment and

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[3] Lewis Carroll, Through the Looking Glass, (Ch. 6: Humpty Dumpty), reprinted in Alice in Wonderland and Other Favorites, Washington Square Press (New York 1951) at 190. This was quoted by S. Blume, M.D., in "The Disease Concept of Alcoholism, 1983", 5 J. of Psychiat. Treatment and Evaluation 471 (1983) (reviewing societal perceptions and medical understanding of alcoholism over the centuries).

public health organizatons during the past thirty years. (Point I)

The fact that alcoholism is a disease has also been recognized by the Congress in two statutes it has enacted in the last seventeen years, the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 and the Rehabilitation Act of 1973. In the first, Congress defined alcoholism as "an illness requiring treatment and rehabilitation" (42 U.S.C. § 4541 (1982)). In the second, Congress defined alcoholism as a "handicap" within the meaning and protection of § 504 (29 U.S.C.A. §§ 794, 706(8)(West Supp. 1987). (Point II)

The Veterans' Administration regulation conclusively defining "primary" alcoholism as nothing more than "willful misconduct" (38 C.F.R. § 3.301 (c)(2))

cannot be squared with the fact that alcoholism is a disease or the laws that Congress has passed defining alcoholism as an illness to be treated and classifying those who suffer from it as handicapped individuals to be protected from discrimination. In this debate over the meaning of words, Congress is the master.

The VA's regulation defining alcoholism as "willful misconduct" violates § 504 of the Rehabilitation Act. The VA's definition is based upon the very sort of archaic attitude toward the handicap of alcoholism that § 504 was designed to overcome. The lower court's reliance on "popular moral philosophy" and "general societal perceptions" about alcoholism to uphold the VA's regulation in effect endorsed discrimination against alcoholics simply because of the "prejudiced fears or ignorance of others."

School Board of Nassau Co., Fla. v. Arline, 107 S.Ct. 1123, 1129 (1987). Arline makes clear that Congress intended that no one may, by focusing on one aspect of a handicap, take it outside the scope of § 504. (Point III)

POINT I: ALCOHOLISM IS NOT WILLFUL MISCONDUCT.

A. Alcoholism Is Recognized and Classified as a Disease by National and International Medical, Psychiatric and Public Health Authorities

The fifty years that have passed since Prohibition have seen the phenomenal growth of medical and scientific knowledge about the etiology and nature of alcoholism. This increased knowledge has produced a consensus, shared by medicine, psychiatry and public health authorities, that alcoholism is a disease, as well as a major national health problem.

The medical community now understands alcoholism to be a complex, progressive and insidious disease characterized by increasing dependence upon consumption of the drug alcohol, and by impairment in social or occupational functioning. This understanding is reflected in the growing awareness in the public at large that alcoholism is an illness, one that afflicts some ten million adult Americans.[4]

Thus alcoholism was recognized as a medical disorder by the World Health Organization in 1951, see World Health Organization, International Classification of Diseases Ninth Edition (ICD-9)(1977)

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[4] See 42 U.S.C. § 4541(a)(2) (1982) (Congressional finding); U.S. Department of Health and Human Services, 6th Special Report on Alcohol and Health, (Washington, D.C. 1986). See also Blume, supra note 1, at 472 (noting results of 1982 Gallup survey which found that 79% of adult Americans agreed that "alcoholism is a disease and should be treated as a disease").

(No. 303, alcohol dependence syndrome); and by the American Medical Association in 1956, see, American Medical Association, Manual on Alcoholism (1957). The American Psychiatric Association (APA) has also recognized alcoholism as a diagnosable and treatable illness for many years. It has classified alcoholism as a distinct category in every edition its Diagnostic and Statistical Manual of Mental Disorders (DSM) since 1953. The diagnostic critera for alcoholism, as set forth in the current edition of this manual, the Diagnostic and Statistical Manual-III (1980), are commonly acceped and widely used by the medical profession; and the most recent update of this manual, the Diagnostic and Statistical Manual-IIIR (1987), continues this practice.[5]

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[5] See DSM-III (1980), No. 303.9x (alcohol dependence). The Committee on

(continued...)

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[5](...continued)
Definitions of the National Council on Alcoholism and the American Medical Society on Alcoholism also prepared a definition of alcoholism which was approved by the National Council on Alcoholism's Public Policy Committee in 1976. See 85 Annals of Internal Medicine, No. 6 (1976). This definition provides as follows:

> Alcoholism is a chronic, progressive, and potentially fatal disease. It is characterized by tolerance and physical dependency or pathologic organ changes, or both -- all the direct or indirect consequences of the alcohol ingested.
>
> 1. "Chronic and progessive" means that the physical, emotional, and social changes that develop are cumulative and progress as drinking continues.
>
> 2. "Tolerance" means brain adaptation to the presence of high concentrations of alcohol.
>
> 3. "Physical dependency" means that withdrawal symptoms occur from decreasing or ceasing consumption of alcohol.
>
> 4. The person with alcoholism cannot consistently predict on any drinking occasion the duration of the episode or the quantity that will be consumed.

(continued...)

B. The Etiology, Nature and Clinical Course of Alcoholism

Millions of adult Americans suffer from alcoholism. However, it is clear that the simple act of drinking -- by itself -- does not itself make an individual an alcoholic. Of all the people who drink, only about five to ten percent

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[5](...continued)

5. Pathologic organ changes can be found in almost any organ, but most often involve the liver, brain, peripheral nervous system, and the gastrointestinal tract.

6. The drinking pattern is generally continuous but may be intermittent, with periods of abstinence between drinking episodes.

7. The social, emotional, and behavioral symptoms and consequences of alcoholism result from the effect of alcohol on the function of the brain. The degree to which these symptoms and signs are considered deviant will depend upon the cultural norms of the society or group in which the person lives.

become alcoholic.[6] No one chooses to become an alcoholic or to begin drinking alcoholically. Instead, persons who become alcoholic generally begin drinking for the same reasons as those who are

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[6] See Affidavit of Anne Geller, M.D., at JA 34, 38; Affidavit of Sheldon Zimberg, M.D., at JA 56, 60. Dr. Geller, a medical specialist, and Dr. Zimberg, a psychiatrist, are two physicians widely recognized as experts in the field of alcoholism research and treatment. They summarized the medical and psychiatric professions' current knowledge about and understanding of alcoholism in affidavits submitted to the District Court in support of petitioner Traynor's successful motion for summary judgment.

Dr. Geller is the Medical Director of the Smithers Alcoholism Treatment Center (which is affiliated with St. Luke's/Roosevelt Hospital in New York) and a faculty member of the Columbia College of Physicians and Surgeons. She has conducted research and taught about alcoholism, and treated thousands of those who have suffered from that condition, for twenty years. Dr. Zimberg, a psychiatrist and teaching physician as well, is the author of The Clinical Management of Alcoholism (Brunner/Mazel, New York 1982). He served on the APA advisory committee for Substance Abuse Disorders which helped develop the definition and diagnostic criteria for alcoholism which appear in the DSM-III.

able to remain social drinkers. What distinguishes the two categories of drinkers -- the social drinker and the alcoholic drinker -- is the latter's loss of control over his or her drinking. "In contrast to the social drinker, once alcohol is in his or her system, the alcoholic's ability not to pick up another drink is lost; it is not something over which he or she has conscious or voluntary control." Geller Aff., at JA 43.

Indeed, the American Medical Association has identified this loss of control as the clinical hallmark of alcoholism.[7]

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[7] In its Manual on Alcoholism, supra, at 11, the AMA noted:

> Consumption of very substantial amounts of alcohol ... and frequent intoxication per se are not necessarily equated with alcoholism, even though these signs usually are prominent in the course of the illness. It can happen that some alcoholics actually consume less liquor over a given length of time than do some social drinkers, but

(continued...)

This failure of control is not because the alcoholic is irresolute or morally weak, but because he or she is alcoholic. "Th[e] inability to alter or modify one's drinking pattern or to control intake once begun is a unique feature of alcoholic drinking, and not a part of social drinking." Geller Aff. at JA 43.

The principal characteristic which the two categories of drinkers share is the initial decision to begin consuming alcohol, and it is this feature alone which can accurately be described as willful or volitional conduct. Social drinking of alcoholic beverages is a voluntary act engaged in by most Americans, and is a socially acceptable practice in the United

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[7](...continued)
this fact in itself does not alter the basic condition nor make it less serious. The key factor is in [loss of] control.
Id. at 6. [Emphasis supplied.]

States. No one begins to drink with an intent to develop alcoholism, or with the knowledge that he or she will become alcoholic. It is utterly illogical to label the behavior of engaging in social drinking as "misconduct".[8]

Alcoholism is a complex and progressive disease of insidious onset which typically

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[8] Indeed, many diseases may be triggered by an individual's voluntary behavior. Cigarette smoking may lead to lung cancer, respiratory illnesses and hypertension; eating patterns affect the progress of diabetes; and improper diet or lack of exercise may contribute to the development of heart disease. Yet the Veterans' Administration does not classify these illnesses as the result of "willful misconduct." It is irrational to single out alcoholism for different treatment. In this respect, however, alcoholism is not alone. It was not so long ago that mental illness, too, was labeled as merely bizarre or inappropriate behavior; and that the victims of a variety of mental disorders were also stigmatized and isolated from society rather than treated for their respective disorders.

develops over the course of many years.[9]

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[9] The VA distinquishes between "primary" alcoholism (which is not the result of an underlying psychiatric disorder) and "secondary" alcoholism (which is). But the "primary/secondary" distinction in the VA's regulatory scheme is illusory and clinically incorrect.

First, in the overwhelming majority of cases, alcoholism is not the result or manifestation of some other preexisting or underlying psychiatric disorder. Geller Aff., at JA 43. While many persons suffering from alcoholism present symptoms of depression and anxiety, which occur as the result of alcohol's effect on neurotransmitters in the brain, only some individuals develop alcoholism secondary to a distinct psychiatric disorder. Id. See generally, M. A. Schuckit, M.D., "Genetic and Clinical Implications of Alcoholism and Affective Disorder," 143 Am. J. Psychiatry 140 (1986).

Second, the VA's distinction does not in fact recognize "primary" alcoholism as any kind of disorder or disability but, rather, defines it simply as bad conduct. This definition ignores the fact that, while the medical and psychiatric professions do, indeed, recognize and distinguish beween alcoholism as a primary disorder (i.e., a medical condition that is not accompanied by another psychiatric disorder) and alcoholism as a secondary disorder (i.e., a medical condition accompanied by a separate psychiatric disorder), those professions both recognize primary alcoholism as a distinct disease -- as the VA does not. This fact is re-

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As the disease progresses, alcohol becomes more and more essential for the alcoholic to function. "The alcoholic drinker does not drink for enjoyment, but to medicate himself or herself." Geller Aff., at JA 40. Many alcoholics develop not merely a

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[9](...continued)
flected in, among other things, the APA's classification of alcoholism as a distinct substance abuse disorder in the DSM-III. See note 5 supra. Zimberg, The Clinical Management of Alcoholism, supra, at 40; and Schuckit, supra, at 140-143.

Finally, as was pointed out by both experts who offered affidavits in the District Court in Mr. Traynor's case, the kind of diagnosis that is made in the case of any particular alcoholic -- "primary" or "secondary" -- is "to a considerable degree fortuitous." Geller Aff. at JA 44; Zimberg Aff. at JA 65-68. This is because the diagnosis is often a function of the nature of the facility where the individual was treated, and has little to do with the patient's clinical history. Thus, patients who are diagnosed and treated in a psychiatric facility are more likely to be labeled as "secondary" alcoholics, while patients treated in detoxification units of general hospitals are usually given a diagnosis of "primary" alcoholism. Zimberg Aff. at JA 67; Geller Aff. at JA 44. See also Zimberg, The Clinical Management of Alcoholism, supra note 6, at 40.

psychological but a physiological dependency upon alcohol, which is characterized by an increasing tolerance for the drug, and withdrawal upon its discontinuance. Withdrawal may cause anxiety, nausea, irritability, seizures, and even death. Geller Aff., at JA 42. "In essence, the physiologically dependent alcoholic uses the drug alcohol out of pure physical necessity." Zimberg Aff., at JA 65.

Moreover, the alcoholic's increasing dependence upon alcohol, whether psychological or physiological, is not something over which he or she is able to exercise conscious control. As the individual becomes progressively more dependent upon alcohol, the phenomenon of denial sets in. As Dr. Geller explained:

> Denial is an unconscious mental mechanism (unlike lying) by which an individual protects himself from recognizing his increasing need for alcohol and from being aware of the often-devastating consequences of

> its use. Denial is a primitive defense mechanism that all people have and may regress to in order to safeguard themselves against the recognition of something which is threatening to their well-being. It is the ostrich syndrome: I don't see it; therefore it is not there. Denial is a common phenonmenon in childhood; it is also a defense mechanism that adults often regress to when faced with catastrophe, illness or other life-threatening circumstances. Denial is a universal characteristic of alcoholism, and is inevitably present in the alcoholic.
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> * * * *
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> It is this combination of gradually increasing dependency and denial that makes alcoholism so insidious an illness: the alcoholic simply does not and cannot let himself recognize what is happening to him.

Geller Aff., at JA 41-42 (emphasis added).

Whether any particular individual who drinks will become an alcoholic is largely the result of forces beyond his or her control. Extensive research has demonstrated that the disease of alcoholism is produced by a confluence of genetic/biochemical, environmental and sociocultural

factors. Geller Aff., at JA 38-40; Zimberg Aff., at JA 60-63.

Research on the genetic component has provided strong evidence that there is an inherited predisposition to developing alcoholism. Individuals with a family history of alcoholism, including parents, siblings, grandparents, uncles and aunts, are at greater risk for developing the disease.[10]

In 1970, a study of the families of 259 hospitalized alcoholics from both a state and a private hospital was per-

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[10] See M. A. Schuckit, M.D., Genetic and Clinical Implications of Alcoholism and Affective Disorder, 143 Am. J. Psychiatry 140, 143-144 (1986). Although research on the genetic component of alcoholism has not been able precisely to determine what it is in an individual's genetic makeup that predisposes him or her to the disease, there is evidence that physical abnormalities in the way these individuals metabolize alcohol may play a role. See Geller Aff., at JA 39. This theory is currently being investigated in order to more fully understand the biochemical nature of alcoholism.

formed. The researchers interviewed first-degree relatives (parents, children, siblings) of the alcoholic individuals, and found that 50 percent of the male first-degree relatives were alcoholic.[11] In another study of half-siblings, children of alcoholic parents raised in foster homes with non-alcoholic parent figures were compared with children without a biological alcoholic parent raised in foster homes with an alcoholic parent figure. For every comparison of the relative influence of having a biological alcoholic parent as opposed to having lived with an adoptive alcoholic parent figure, the biological influence predominated in relation to the development of

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[11] J. Winoker, T. Reich, J. Rimmer et al., "Alcoholism: III Diagnosis and Familial Psychiatric Illness in 259 Alcoholic Probands," 23 Arch. Gen. Psychiat. 104 (1970).

alcoholism.[12] Additional research was conducted on adopted children and twins in Scandinavia. These adoptee studies concerned children of alcoholic families who were adopted away from their biological parents at birth. Those studies showed that, while the incidence of alcoholism among the general population of males in Scandinavia is approximately 7 percent, the incidence of the disease among adoptees with one alcoholic biological parent rose to 25 percent; and, if both biological parents were alcoholic, the incidence of alcoholism in their adopted-away offspring rose to 50 per-

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[12] M. A. Schuckit, D.W. Goodwin & J. Winokur, "A Half-Sibling Study of Alcoholism", 128 Amer. J. Psychiat. 1132 (1972); and see R.J. Cadoret, C.A. Cain, & W. Grove, "Development of Alcholism in Adoptees Raised Apart from Biologic Parents," 37 Arch Gen. Psychiat. 561 (1980). See also Zimberg Aff., at JA 60.

cent.[13]

Another factor contributing to the development of alcoholism is an individual's environmental and sociocultural background. The use of and attitudes towards alcohol differs between and within societies, cultures, subcultures, ethnic, and religious groups. These differences fall within several general types and help to determine general rates of alcoholism.

For example, in groups or societies where drinking is accepted and where drinking practices feature heavy, regular drinking, or drinking-to-drunkeness, individuals tend to be vulnerable to

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[13] M. Bohman, S. Sigvardsson & R. Cloninger, "Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Alcoholic Men", 38 Arch. Gen. Psychiat. 861 (1981). See also M. Bohman, S. Sigvardsson & R. Cloninger, "Maternal Inheritance of Alcohol Abuse: Cross-Fostering Analysis of Adopted Women", 38 Arch. Gen. Psychiat. 965 (1981); and Geller Aff., at JA 39.

developing alcoholism. On the other hand, in societies which encourage total abstinence from alcohol, alcoholism is relatively rare. Finally, in societies where the use of alcohol is accepted within specific settings, rituals, or ceremonial rites, the incidence of alcoholism varies with the degree of controls for strict use and against excesses.[14]

In short, alcoholism is a disease, like many others, that results from a complex combination of genetic predisposition, environmental factors, cultural attitudes and intentional actions having unintended consequences. It is compounded by the addictive nature of the drug alcohol (which, like many other drugs, can lead to both psychological and physio-

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[14] Zimberg, Clinical Management of Alcoholism, supra, at 12 - 14; see also Zimberg Aff., at JA 61-62.

logical dependence), and the compelling phenomenon of denial.

To characterize this medical disorder as the result of "willful misconduct"--or, as the majority opinion in McKelvey v. Turnage put it, as a "willfully caused handicap", 792 F.2d at 200 -- is to completely disregard the known data about the disease, the overwhelming opinion of medical and psychiatric authorities and treatment professionals, and the scientific and medical knowledge that these authorities have developed about alcoholism during the last fifty years.

POINT II: CONGRESS HAS DETERMINED THAT ALCOHOLISM IS AN ILLNESS AND A HANDICAP, AND HAS FORBIDDEN DISCRIMINATION AGAINST ALCOHOLICS

Since 1970, when it enacted the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act, Congress has recognized that "alcoholism is an illness requiring treatment and rehabilitation", 42 U.S.C. §4541(a)(8) (1982), and has sustained a comprehensive federal effort to foster the treatment and enhance the rehabilitation of persons suffering from that illness.[15]

In enacting and extending both the Comprehensive Alcoholism Act and the Rehabilitation Act, Congress has repeatedly noted that the federal legislative commitment to treat alcoholism as a medical

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[15] See Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, Pub. L. 91-616, 84 Stat. 1848, codified as amended at 42 U.S.C. §§ 4541 et seq. (1982) (the "Comprehensive Alcoholism Act").

rather than a moral impairment reflects the long-standing consensus of health authorities about the nature of, and appropriate response to, alcoholism.[16] Congress has also often noted and deplored the lingering social "stigma" and underlying attitudes of blame that persist toward those who suffer from alcoholism.[17]

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[16] See, e.g., S. Rep. No. 91-1069, 91st Cong., 2d. Sess. 1, 3 (1970); S. Rep. No. 96-103, 96th Cong., 1st Sess. 3-4, reprinted in 1979 U.S. Code Cong. & Ad. News, 2681, 2682-83 (noting, when enacting and extending the Comprehensive Alcoholism Act, that by 1968 "alcoholism had been recognized as a disease by the World Health Organization, the American Medical Association, the American Hospital Association, and the American Psychiatric Association"). See also 124 Cong. Rec. S15,569 (daily ed. Sept. 20, 1978) (remarks of Sen. Hathaway).

[17] S. Rep. No. 96-103, 96th Cong., 1st Sess. 15, reprinted in 1979 U.S. Code Cong. & Ad. News 2681, 2694 (discussing 1979 extension of Comprehensive Alcoholism Act); 124 Cong. Rec. S15,567-69 (daily ed. Sept. 20, 1978) (considering 1978 amendments to Rehabilitation Act, described below) (remarks of Sen. Stafford).

In 1973, Congress enacted the first federal civil rights law protecting individuals from discrimination on the basis of handicap: Title V of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791-794a (1982). Section 504 of the Rehabilitation Act provides that "no otherwise qualified individual with handicaps...shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by the law. 29 U.S.C.A. §794 (West Supp. 1987).

That alcoholism is among the "mental or physical impairments" which constitute handicaps for purposes of § 504 was confirmed in 1977 by the United States Attorney General, re-confirmed in 1977 and 1978 by the Department of Health, Education and Welfare, and confirmed yet again

in 1978 by Congress itself.

In 1977, the Attorney General issued an official opinion concluding that "alcoholics...are included within the statutory definition of 'handicapped individuals' for purposes of Title V, which includes the antidiscrimination provision in section 504...." 43 Op. Att'y Gen. No. 12 (1977), at 2. The Attorney General based this opinion on the legislative history of the statute, the statute's broad definition of "handicapped individual", and the "substantial body of authority...that alcoholism and drug addiction are diseases...." Id. at 7.

Subsequently, the United States Department of Health, Education and Welfare, which was charged with the general interpretation and implementation of section 504, issued regulations which also concluded that persons with histories of

alcoholism are "handicapped individuals" within the scope of protection of § 504.[18] HEW's treatment of the issue explicitly recognized "the medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily physical or mental." 42 Fed. Reg. 22,686 (1977).

Finally, in 1978, Congress amended the Rehabilitation Act's definition of "handicapped individual" in order to clarify § 504's coverage of current and recovered alcoholics in the context of employment, and in the course of doing so made the Act's protection of persons with conditions or histories of alcoholism

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[18] See Exec. Order No. 11,914, 3 C.F.R. 117 (1977); 42 Fed. Reg. 22,676, 22,686 (1977); 43 Fed. Reg. 2132, 2134 (1978). See also 45 C.F.R. §85.31 (1985).

explicit.[19] In the debates leading up to the amendment, members of Congress noted once again the "ample evidence that... alcoholics are subject to discrimination in access to benefits, services and employment", and emphasized again that "alcoholism...alone may not be the sole basis for discrimination." 124 Cong. Rec. S15,568, S15,569 (1978) (remarks of Sen. Hathaway) (emphasis supplied).

In its 1978 amendments to the Act, Congress also extended section 504's prohibition against discrimination based on handicap to all federal agencies, including the Veterans' Administration. 1978 Rehabilitation Act Amendments, Pub.

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[19] See the Rehabilitation, Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. 95-602, §122(a)(6), 92 Stat. 2984-85 (1978) ("1978 Rehabilitation Act Amendments"). This was formerly codified at 29 U.S.C. § 706(7)(B) (1982), and is now codified at 29 U.S.C. § 706(8)(B) (West Supp. 1987).

L. 95-602, §119(2), 92 Stat. 2982 (1978), codified at 29 U.S.C. §794 (1982).

These legislative developments leave no doubt that Congress has determined that alcoholism is a disease and that alcoholics are handicapped individuals who may not be denied the benefits of any government program solely because of their handicap.

Indeed, this Court recently pointed to the 1978 amendments and their explicit coverage of alcoholics in reaching its conclusion that § 504 prohibits blanket discrimination against persons with handicaps that may engender fear or disapproval in others:

> [I]n its 1978 amendments...Congress recognized that employers and other grantees might have legitimate reasons not to extend jobs or benefits to drug addicts and alcholics, but also undersood the danger of improper discrimination against such individuals if they were categorically excluded from coverage under the Act. Congress therefore rejec-

> ted the original House proposal to exclude addicts and alcoholics from the definition of handicapped individual, and instead adopted the Senate proposal excluding only those alcholics and drug abusers "whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question..." (citations omitted).

School Board of Nassau Co., Fla. v. Arline, 107 S.Ct. 1123, 1130, n.14 (1987).

The Veterans' Administration's regulation and policy does precisely what Congress has prohibited: by defining alcoholism as "willful misconduct", the VA categorically excludes most alcoholics from using their benefits solely because of their handicap.

POINT III: THE VA'S REGULATION DEFINING ALCOHOLISM AS "WILLFUL MISCONDUCT" VIOLATES § 504 OF THE REHABILITATION ACT

In Arline, this Court recognized that the Rehabilitation Act's broad definition of "handicapped individual" demonstrated

> Congress' concern with protecting the handicapped against discrimination stemming not only from simple prejudice, but from 'archaic attitudes and laws'

which reflect continuing public ignorance of and insensitivity to many handicaps. School Board of Nassau Co., Fla. v. Arline, supra, 107 S.Ct. at 1126 (1987). The VA regulation that defines alcoholism as "willful misconduct" is an archaic law stemming from archiac attitudes; it is based on prejudice and ignorance; it violates both the letter and spirit of the Rehabilitation Act.

It is not surprising that the VA's definition of alcoholism as willful misconduct had its origin in a regulation

issued in 1933,[20] during Prohibition, at

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[20] As the Board of Veterans' Appeals pointed out in its final decision denying Mr. Traynor's administrative appeal upon reconsideration, the VA regulation whose conclusive classification of "primary" alcoholism as "willful misconduct" is challenged in this case had its origin in a Presidential regulation issued pursuant to Title I of the Economy Act of 1933:

> [Pursuant to] the Public Law by which Congress initially authorized the President of the United States to promulgate Veterans Administration regulations, Public Law 73-2, [§§ 3, 4, 48 Stat. 8, 9 (1933)] ...President Franklin D. Roosevelt promulgated old Veterans Regulation No. 10, precursor of current regulations, mandating that a disability be held to have resulted from misconduct when it was "[incurred] by an act contrary to the principles of good morals; or as a result of gross negligence, gross carelessness, alcoholism, drug addiction, self-infliction of wounds, etc." (Emphasis supplied.) Since then, a distinction has been maintained between fortuitously incurred disease or disability, for which gratuitous Veterans' Administration benefits may be afforded, and other nonfortuitous disabilities incurred at the hands of the claimant himself....

(86-622 Traynor Cert. Pet. at 118a-119a).

a time when the true nature of alcoholism as a disease was not yet known. Despite the tremendous advances the past fifty years have brought in understanding and treating the disease of alcoholism, the concept of alcoholism as nothing more than one among several sorts of bad conduct has been set in stone by the VA. Indeed, the VA's current concept of alcoholism in 38 C.F.R. § 3.301(c)(2) (1985) is identical to that of the original 1933 regulation.[21]

The effect of this regulation is to deny to alcoholics like Traynor and McKelvey -- solely on the basis of their hand-

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[21] While the agency now makes a distinction between so-called "primary" alcoholism (that which is not a manifestation of an underlying psychiatric disorder) and "secondary alcoholism" (that which is a manifestation of an underlying psychiatric disorder), it continues to define "primary" alcoholism itself as "willful misconduct" per se. See supra, note 9.

icap -- the right to extend their educational assistance benefits, a right that is accorded to all other handicapped veterans.

The VA argues that it is not denying Traynor and McKelvey extensions because of their illness, but rather because it has conclusively determined that their illness was caused by the veterans' behavior. As discussed in Point II above, this outdated view of alcoholism has been flatly rejected both by Congress and by all leading medical authorities, including the American Medical Association and the American Psychiatric Association.[22]

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[22] The ruling of the Court of Appeals in McKelvey v. Turnage below also ignored Congress' explicit recognition that alcoholism is an illness and a handicap for purposes of § 504 of the Rehabilitation Act. Instead, the Court agreed with the VA's contention that its definition of alcoholism as mere misconduct still finds some support "within the field of medicine and within what might be termed the arena

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Furthermore, this Court rejected essentially the same argument in Arline. In that case, the school district claimed it had not fired a teacher because she was handicapped, but had fired her because it

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[22](...continued)
of popular moral philosophy". Id., 792 F.2d at 202. That finding and conclusion, however, are fundamentally erroneous.

As discussed in Point II, the overwhelming majority of medical opinion has flatly rejected the concept of alcoholism so readily accepted by the court below. The continuing debate in the fields of medicine, psychiatry, alcoholism treatment and public health generally focuses not on whether alcoholism is or is not a distinct and diagnosable disease -- indeed, both primary and secondary alcoholism are each recognized as separate clinical entitities -- but rather on whether, in any particular individual suffering from it, this illness should appropriately be treated as primarily a medical or a psychiatric disorder.

Indeed, the Congress has acknowleged the existence of this debate, but has deemed it irrelevant for purposes of § 504 whether this handicap is, or is treated as, a medical or a psychiatric impairment. It is alcoholism itself, in whatever form, that Congress has deemed to be a handicap under the Act. See 29 U.S.C. § 706(8)(B), (West Supp. 1987); 42 Fed. Reg 22,686 (1977).

presumed that her illness was contagious. The Court's response to that argument was that "Arline's contagiousness and her physical impairment each resulted from the same underlying [disease]." Id., 107 S.Ct. at 1128. The school district could not, by seizing upon one aspect of the disease, remove it from § 504's protection. It could not put forward "myths and fears about disability and disease" as justification for its discriminatory action. Id., 107 S.Ct. at 1129.

The same reasoning applies in this case. Congress has determined that alcoholism is a handicap and has protected those with that disease from discrimination. The VA cannot argue that it is not discriminating against petitioners as alcoholics, but is denying them benefits because it has conclusively presumed that alcoholism is always caused by willful

misconduct. The physical act of drinking and the impairment caused by alcoholism "result from the same underlying [disease]." The VA cannot, by seizing upon one aspect of the disease of alcoholism -- the fact that it involves a physical act -- remove it from § 504's protection. It cannot put forward "society's accumulated myths and fears" as justification for its discriminatory action.

Yet this is precisely what the majority in McKelvey v. Turnage would permit the VA to do. The majority accepted the VA's ironclad classification of "primary" alcoholism as simply willful "conduct" as a "reasonable" basis for discriminating against those engaging in such "conduct". Id., 792 F.2d 194, 200, 201 (D.C. Cir. 1986) (emphasis in original). Indeed, the majority did exactly what Arline condemned: it looked to "the arena of popular

moral philosophy" and to "general societal perceptions" about alcoholism and found there a basis for justifying the VA's classification of alcoholism as "willful misconduct." Id., 792 F.2d at 201, 202.[23]

The VA regulation challenged in this case perpetuates the long-discredited

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[23] The McKelvey majority also erred in assuming that an agency subject to § 504 need only show a "reasonable" basis for excluding any group of the persons protected by § 504 from any covered program or activity, 792 F.2d at 200. At the very least, § 504 demands a "substantial showing that [a covered agency's exclusionary policy or] regulations are justified", as the District Court in Traynor correctly noted. Traynor v. Walters, 606 F.Supp. 391, 400 (S.D.N.Y. 1985)(emphasis added) (citing New York State Ass'n for Retarded Children v. Carey, 612 F.2d 644, 650 (2nd Cir. 1979)). See also Strathie v. Dept. of Transportation, 716 F.2d 227, 229-231 (3rd Cir. 1983); Bentivegna v. U.S. Dept. of Labor, 694 F.2d 619, 621-22 (9th Cir. 1982); Shirey v. Devine, 670 F.2d 1188, 1204 & n.46 (D.C. Cir. 1982) (discussing § 501 as it relates to § 504); Pushkin v. Regents of Univ. of Colorado, 658 F.2d 1372, 1383-1387 (10th Cir. 1981) (all adopting substantial justification requirement).

myth that alcoholism is the result of misbehavior, no different than deliberatly shooting oneself in the foot. In fact, medical authorities have conclusively established that alcoholism is a disease, and Congress has included alcoholism in the list of handicaps encompassed under the Rehabilitation Act.

Only by ruling that the challenged regulation is illegal under § 504 of the Rehabiliation Act can this Court ensure that veterans with histories of alcoholism who seek to participate in the VA's educational assistance program will have their qualifications for such participation assessed, not on the basis of unfounded "prejudice [or] stereotype", but on the basis of "appropriate findings of fact ..., based on reasonable judgments given the state of medical knowledge" about alcoholism as it is understood today.

Arline, supra, 107 S.Ct. at 1131. Only if this Court thus ensures that these individuals (like all other persons with handicaps within the protection of the Rehabilitation Act) are judged on their individual merits will they finally be assured the "meaningful access" to the VA's educational assistance program, like all other programs covered by the Act, that § 504 was designed to secure. Alexander v. Choate, 469 U.S. 287, 301 (1985).

The VA's regulation flatly violates § 504 of the Rehabilitation Act, and the erroneous ruling and judgment below must therefore be reversed.

CONCLUSION

For the reasons discussed above, the Court should reverse the decision of the D.C. Circuit in McKelvey v. Turnage, reverse the decision of the Second Circuit in Traynor v. Walters, and invalidate the VA's willful misconduct regulation because it violates § 504 of the Rehabilitation Act.

Dated: May 28, 1987

Respectfully submitted,

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Nos. 86-622 and 86-737

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

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v.
THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS AFFAIRS AND VETERANS' ADMINISTRATION,
Respondent

JAMES P. MCKELVEY,
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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second and District of Columbia Circuits

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN PSYCHIATRIC ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF BOTH PETITIONERS

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May 28, 1987

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QUESTION PRESENTED

Amici curiae will address the following question:

Whether a Veterans' Administration regulation, which defines the disease of primary alcoholism as *per se* willful misconduct and thus automatically denies extended education benefits to veterans suffering from the disease without an individualized determination about the origins and nature of their affliction, violates Section 504 of the Rehabilitation Act of 1973?

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IN THE

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BRIEF OF THE AMERICAN MEDICAL ASSOCIATION AND THE AMERICAN PSYCHIATRIC ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF BOTH PETITIONERS

INTEREST OF *AMICI CURIAE*

Amicus American Medical Association ("AMA") is a private, voluntary, non-profit organization of physicians. The AMA was founded in 1846 to promote the science and art of medicine and the improvement of public health. Today, its membership exceeds 280,000 physi-

cians and medical students nationwide. *Amicus* American Psychiatric Association ("APA") is the nation's largest professional association specializing in psychiatry, with a membership exceeding 30,000 physicians. APA's purposes include promoting the welfare of patients who require psychiatric services.

At issue in this case is a regulation of the Veterans' Administration ("VA") which conclusively presumes that alcoholism involves "willful misconduct" unless it can be shown that the alcoholism is the product of an underlying psychiatric disorder. The VA's *per se* rule was upheld by the D.C. Circuit on the basis that it was consistent with "general societal perceptions" concerning alcoholism. No. 86-737, Pet. App. 12a. The court expressly disavowed reliance upon any "medical judgments" about alcoholism on the ground that they are "immaterial." *Id.* at 11a, 12a. *Amici* believe that disregard of medical facts concerning a handicap, such as alcoholism, is manifestly inconsistent with the language and purpose of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Accordingly, *amici* wish to present their views concerning alcoholism and explain why it is inappropriate to permit the VA to deny veterans a benefit on the ground that their "handicap"—"primary alcoholism"—must always be the result of "willful misconduct."[1]

MEDICAL, STATUTORY AND REGULATORY BACKGROUND

A. Alcoholism Is A Disease

Ninety-five million Americans consume alcoholic beverages, and it is estimated that 11 percent, or 10 million of them, suffer from alcoholism. U.S. Dept. of Health,

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[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

Education, and Welfare, *The Alcohol, Drug Abuse, and Mental Health National Data Book* 15 (1980). Physicians estimate that between 20 and 25 percent of all general hospital admissions and one-third of all psychiatric admissions are directly or indirectly related to the use of alcohol. Knott, *Alcohol Problems: Diagnosis and Treatment* 6 (1986). When all the direct and indirect consequences of the disease are taken into account, alcoholism ranks as the third leading cause of death in the United States. Miller & Frances, *Psychiatrists and the Treatment of Addictions: Perceptions and Practices*, 12 Am. J. Drug & Alcohol Abuse 187, 188 (1986).

Alcoholism is defined generally as the chronic, pathological use of alcohol. There has been a consensus in the medical profession for nearly 30 years that such pathological use of alcohol is a disease. *Amicus* AMA first described alcoholism as a disease appropriate for medical treatment in 1956, stating that:

> Alcoholism is an illness characterized by preoccupation with alcohol and loss of control over its consumption such as to lead usually to intoxication if drinking is begun; by chronicity; by progression; and by tendency toward relapse. It is typically associated with physical disability and impaired emotional, occupational, and/or social adjustments as a direct consequence of persistent and excessive use.

American Medical Association, *Manual on Alcoholism* 6 (1957). Similarly, *amicus* APA has long recognized that alcoholism is a disease, classifying it as a distinct mental disorder since the publication of its first edition of *Diagnostic and Statistical Manual of Mental Disorders* ("DSM") in 1952.[2] The World Health Organiza-

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[2] The current diagnostic criteria for alcoholism are contained in DSM-III-R, published in 1987. Since 1980, the APA has subdivided the mental disorder of alcoholism into two general categories—alcohol dependence and abuse, and alcohol-induced organic mental disorders. The former category is what we commonly think of as

tion ("WHO") has recognized alcoholism as a distinct disease since 1951. *International Classification of Diseases, Ninth Edition* (ICD-9) (WHO, 1977) (No. 303, alcohol dependence syndrome).

Contrary to popular misconceptions, occasional excessive use of alcohol is not synonymous with the disease of alcoholism. As the AMA has emphasized, "[c]onsumption of very substantial amounts of alcohol . . . and frequent intoxication *per se* are *not necessarily equated* with alcoholism, even though these signs usually are prominent in the course of the illness." AMA, *Manual on Alcoholism* 6 (1957) (emphasis in original). Rather, the distinguishing feature of the disease of alcoholism is chronic, uncontrollable use. In the words of the original AMA statement on alcoholism, "*[t]he key factor is in control.*" *Id.*

Unlike diseases such as tuberculosis that have purely physiological causes and manifestations, the disease of alcoholism has a variety of causes and a multitude of manifestations leading to physiological, psychological and social impairment. AMA Report of the Council on Scientific Affairs, *Alcoholism as a Disability* (Dec. 1980). The variety of causes and symptoms has complicated the task of developing diagnostic criteria for alcoholism. E.M. Jellinek, who is widely credited with spurring the medical community to recognize alcoholism as a disease, described five distinct types of alcoholism. Jellinek, *The Disease Concept of Alcoholism* (1960). Later, work by researchers from the Washington University in St. Louis led to the development of four categories of symptoms

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the disease of alcoholism, distinguished by chronic, pathological use of, and in some cases physical dependence on, alcohol. DSM-III, p. 169 (1980). In contrast, the second category includes a variety of organic mental disorders that are attributed to the ingestion of alcohol, such as alcohol hallucinosis and alcohol withdrawal delirium. DSM-III-R, pp. 127-34 (1987).

for use in diagnosing alcoholism. Feighner, *et al.*, *Diagnostic Criteria for Use in Psychiatric Research*, 26 Arch. Gen. Psychiatry 57, 60-61 (1972); see also Paredes, *Models and Definitions of Alcoholism*, in Alcoholism: Development, Consequences, and Interventions 57 (Estes & Heinemann eds. 1986). In 1972, the National Council on Alcoholism established elaborate criteria for the diagnosis of alcoholism, including 28 major and 58 minor physiological, behavioral, psychological and attitudinal parameters. Criteria Committee of the National Council on Alcoholism, *Criteria for the Diagnosis of Alcoholism*, 129 Am. J. Psychiatry 127-35 (1972).

Despite the difficulty of establishing universally agreed upon diagnostic criteria for alcoholism, the medical community has accepted a division of alcoholism into two very general diagnostic categories, primary and secondary, *Categories, Careers, and Outcomes of Alcoholism*, The Lancet 719 (March 19, 1986). This shorthand division distinguishes those patients whose illness is not the result of a pre-existing psychiatric disorder (primary alcoholism) from those whose illness is secondary to psychiatric problems (secondary alcoholism). *Id.* This division by etiology of alcoholism is useful for treatment purposes, but it does not distinguish types of alcoholism on the basis of which constitutes an illness. Both primary and secondary alcoholism are generally accepted by the medical community to be diseases.

In the last 20 years medical researchers have conducted extensive studies in order to determine the etiology of primary alcoholism. Those studies have revealed that primary alcoholism may result from a variety of causes and that certain factors predispose a given individual to developing primary alcoholism. Scientists have found that, in contrast to the development of secondary alcoholism, primary alcoholism has a strong genetic link. Family studies have revealed that sons and

daughters of alcoholics are three to four times as likely to develop primary alcoholism as are children of non-alcoholic parents. Schuckit, *Genetic Aspects of Alcoholism*, 15 Ann. Emerg. Med. 991, 992 (Sept. 1986). In order to separate out the impact of heredity from that of environment in the development of primary alcoholism, other researchers have studied alcoholism rates of adults in Sweden adopted before the age of 3. Those studies found that adopted sons whose biological fathers were alcoholic were three times more likely to become alcoholic than were adopted sons of non-alcoholic biological fathers. Bohman, *Some Genetic Aspects of Alcoholism and Criminality: A Population of Adoptees*, 35 Arch. Gen. Psychiatry 269-76 (1978).[3]

Environmental, socio-cultural and psychological factors play a role in the development of primary alcoholism,[4] much as they do in the development of diseases such as coronary atherosclerosis, diabetes and schizophrenia. Vaillant, *The Natural History of Alcoholism* 45-101 (1983). Those factors do not, however, rise to the level of psychiatric disorders as defined by the APA. Thus, the mere presence of a psychological component in the development of alcoholism in a given individual does not necessarily mean that the individual is afflicted with

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[3] Further studies have also identified a severe type of hereditary predisposition that occurs only among men. The studies found that adopted sons whose biological fathers suffer from this male-limited alcoholism are 9 times more likely to develop the disease. National Institute on Alcohol Abuse and Alcoholism, *Alcoholism: An Inherited Disease* 9, 11 (1985), citing Cloninger, Bohman & Sigvardsson, *Inheritance of Alcohol Abuse*, 38 Arch. Gen. Psychiatry 861-68 (1981).

[4] Summarizing the results of the numerous studies of the genetic link in alcoholism, one researcher concluded that "[n]o findings from genetically-oriented research have disputed the significance of behavioral, psychodynamic, existential and social-group factors in . . . explaining the drinking of the alcoholic individual." Peele, *The Implications and Limitations of Genetic Models of Alcoholism and Other Addictions*, 47 J. Stud. Alcohol 63, 71 (1986).

"secondary alcoholism." Only when the alcoholism is the result or manifestation, in large part, of a pre-existing psychiatric disorder, is a diagnosis of secondary alcoholism appropriate. Schuckit estimates that 20 to 30 percent of alcoholics suffer from secondary alcoholism. Schuckit, *Genetic and Clinical Implications of Alcoholism and Affective Disorder*, 143 Am. J. Psychiatry 140 (1986).

The distinction between primary and secondary alcoholism is important in determining the most effective mode of treatment, but it may be difficult for the physician to make a proper diagnosis. For example, many alcoholics begin a pattern of chronic, uncontrolled drinking while quite young, some while still teenagers. DSM-III-R, p. 174 ("In males the onset [of alcohol dependence]is usually in the late teens or the 20s, the course is insidious, and the person may not me fully aware of his dependence on alcohol until the 30s.") Due to cultural factors and family income level, such youngsters may be very unlikely to receive any psychiatric evaluation that would *predate* the more immediately apparent "symptom" of excessive, uncontrolled drinking. Thus, it is unlikely that there would be a prior evaluation of psychiatric disorders to support a diagnosis of an individual's alcoholism as secondary.

The difficulty in establishing an accurate diagnosis of primary as opposed to secondary alcoholism is further complicated by the fact that primary alcoholics often exhibit symptoms of psychiatric disorders caused by the effect of alcohol on the neurotransmitters in the brain. For instance, an individual who is alcohol-dependent and has engaged in heavy drinking for an extended period of time may develop alcohol hallucinosis, a disorder in which the person suffers from hallucinations, often persecutory, that may be clinically indistinguishable from schizophrenia. DSM-III-R, pp. 131-32. Because a primary alcoholic may exhibit such symptoms of psychiatric disorders, it is necessary to observe a patient alcohol-free

for three or four weeks in order to establish an accurate diagnosis of primary as opposed to secondary alcoholism. Zimbert, *The Clinical Management of Alcoholism* 40 (1982). If the psychiatric symptoms persist once the physiological effects of alcoholism have subsided, the physician can reasonably assume that the psychiatric disorder is causal and predates the secondary manifestation of alcoholism. *Id.* But, alcoholics are typically admitted to medical or psychiatric facilities for a brief period of time (No. 86-622, Pet. App. 92a-93a; No. 86-737, C.A. App. 30-32 (despite serious alcoholism and related complications, neither petitioner was hospitalized for more than two weeks at any one time)), and therefore, the diagnosis of primary or secondary alcoholism rendered at such a time has little guarante of accuracy.

In addition to the psychological consequences of anxiety and depression that often accompany alcoholism, there are a variety of organic diseases that may result from either primary or secondary alcoholism. Such diseases include cirrhosis of the liver and alcohol hepatitis (Zook & Moore, *High-cost Users of Medical Care*, 302 N. Engl. J. Med. 996 (1980)), erosive gastritis (Hall, Skinner & Israel, *Early Identification of Alcohol Abuse* :2: *Clinical and Laboratory Indicators*, 124 Can. Med. Assoc. J. 1279, 1280 (1981)), delirium tremens (*Id.*), hypertension (Ashley & Rankin, *Hazardous Alcohol Consumption and Diseases of the Circulatory System*, 41 J. Stud. Alcohol 1040 (1980)), cerebral atrophy, dementia and polyneuritis (Paredes, *Models and Definitions of Alcoholism*, in Alcoholism: Development, Consequences, and Interventions 54 (Estes & Heinemann eds. 1986)).

B. Section 504 Recognizes Alcoholism As a Possible Handicap And Does Not Distinguish Between Primary and Secondary Alcoholism

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, prohibits an Executive agency from denying the benefits of any of its programs to someone solely on the basis

that the individual is handicapped. The statute provides in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in Section 7 [29 U.S.C. § 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . .[5]

Section 504 has consistently been interpreted to include alcoholics as "handicapped individuals," and to treat alcoholism as a disabling disease.

When asked specifically to address the issue of alcoholism as a disability under Section 504 in 1977, the Attorney General issued a formal opinion confirming that "section 504 does in general prohibit discrimination against alcoholics and drug addicts in federally assisted programs solely because of their status as such, *just as it prohibits discrimination solely on the basis of other diseases* or conditions covered by the Act . . . . The legislative history of the Rehabilitation Act of 1973 indicates that drug addiction and *alcoholism were to be regarded as covered physicial or mental disabilities.*" 43 Op. Att'y Gen. No. 12 (April 12, 1977) at 2 (emphasis added).

In 1977, the Secretary of the Department of Health, Education and Welfare (HEW, now the Department of Health and Human Services) promulgated regulations pursuant to section 504 which prohibit federally-funded

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[5] In October, 1986, the term "handicapped individual" was changed to "individual with handicaps" in response to testimony before Congress describing the former language as "inadvertently adding to the stereotype that persons with handicaps are less worthy." H. Rep. No. 571, 99th Cong., 2d Sess. 17, *reprinted in* 1986 U.S. Code Cong. & Ad. News 3471, 3487. Since the court of appeals discussed the prior language, we will cite to the pre-1986 language as well.

hospitals and outpatient facilities from discriminating against alcoholics in admission or treatment. 45 C.F.R. § 84.53. In an extensive analysis accompanying the regulation, the Secretary emphasized that there is a "medical and legal consensus" that alcoholism is a disease. 45 C.F.R. Part 84, App. A at 326. Moreover, the Secretary carefully distinguished between the "behavioral manifestations" of alcoholism, which may be taken into account when assessing eligibility for services, and the condition of alcoholism itself, which may not provide the basis for the denial of benefits or services. *Id.* The 1978 HEW guidelines implementing Section 504 specifically included alcoholics within the meaning of "handicapped person." The regulation provided that " 'physical or mental impairment' [for the purposes of identifying a handicapped person] includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism." 43 Fed. Reg. 2137 (1978).

In 1978, Congress amended Section 504 to clarify, *inter alia*, that for the purposes of employment Section 504 does not treat an alcoholic whose current use of alcohol either prevents him from performing his job duties or presents a direct threat to the property or safety of others as a handicapped individual. 29 U.S.C. § 706 (7)(B). The amendment did not otherwise limit the applicability of Section 504 to alcoholics, clearly indicating that alcoholics otherwise remain protected under Section 504. Moreover, in 1978 Congress for the first time extended Section 504's prohibition against discrimination based on handicap to all federal agencies, including the Veterans' Administration. 29 U.S.C. § 794 (1982).[6]

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[6] The VA regulations implementing Section 504 include the veterans' educational benefits program as one of the programs covered by Section 504. 38 C.F.R. Part 18, Subp. D, App. A. And, in 1980,

C. The Veterans' Administration's Regulatory Scheme

Petitioners McKelvey and Traynor are veterans who had requested educational benefits from the Veterans' Administration pursuant to 38 U.S.C. § 1662. Although neither had fully used his benefits within the ordinary time provided for by the statute, both requested an extension of the time limit under a provision that grants such extensions to "any eligible veteran who was prevented from initiating or completing such veteran's chosen program of education within such time period because of a physical or mental disability which was not the result of such veteran's own willful misconduct." 38 U.S.C. § 1662(a)(1). Both claimed that they had been alcoholics during the period subsequent to their discharges and that their condition had precluded them from seeking an education within the specified period.

The VA rejected the extension on the ground that each petitioner's alcoholism had constituted "willful misconduct." That term is defined in the regulations as "an act involving conscious wrongdoing or known prohibited action [that] involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 38 C.F.R. § 3.1(n). Although neither the statute nor the regulation makes any reference to "alcoholism," the VA has interpreted its regulation to require "primary alcoholism" to be treated automatically as "willful misconduct." V.A. Decision No. 988, Aug. 13, 1964. Because neither petitioner could prove that his alcoholism was the product of a distinct psychiatric disorder, the VA denied them benefits without any factual inquiry into whether either actually had engaged in any "willful misconduct" that caused his disease.

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the VA adopted the HEW guidelines, specifically using the exact language quoted in the definition of "handicapped person." 38 C.F.R. § 18.403(j)(2)(i)(C).

The origins of the Veterans' Administration rule treating alcoholism as willful misconduct date back over fifty years, to a time when alcoholism was poorly understood by the general public and little studied by the medical community. The precursor to Section 3.301(c)(2) specified that disabilities resulting from "an act contrary to principles of good morals . . . gross negligence, gross carelessness [or] alcoholism" would be deemed the result of misconduct. Exec. Order 6098 (March 31, 1933). Thus, the original VA regulation created a *per se* rule that all disabilities caused by or resulting from alcoholism are necessarily due to willful misconduct.

By equating alcoholism with acts contrary to the "principles of good morals," the original VA regulation reflected Prohibition era concepts of alcoholism as a moral blight, a reflection of weak will rather than disease. Aaron & Musto, *Temperance and Prohibition in America: A Historical Overview* in Alcohol and Public Policy: Beyond the Shadow of Prohibition 160 (Moore & Gerstein eds. 1981). Under the then-dominant view of alcoholism often referred to as the "sin" model, the "sinful" alcoholic was considered capable of reforming himself through the exertion of will. *Id.* at 46. The Prohibition era roots and presumptions are also reflected in the first VA Administrator's Decision involving alcohol, in which the Administrator stated that "if in the drinking of any beverage for the purpose of enjoying its intoxicating effects, excessive indulgence leads to disability, *willful misconduct would undoubtedly inhere* in the act." Administrator's Decision, Veterans' Administration, No. 2 (March 21, 1931) (emphasis added).

The presumptions underlying the current *per se* rule, which treats primary alcoholism as willful misconduct, are contrary to the great weight of modern medical understanding of alcoholism. Since the original VA alcoholism decision in 1931, the medical understanding of

alcoholism has advanced enormously.[7] With the repeal of Prohibition in 1933 and the creation of Alcoholics Anonymous in 1935, social and medical views conerning alcoholism began to change. As noted, pp. 3-4 *supra*, by 1968 virtually every major medical and health organization had recognized alcoholism as a distinct, albeit complex disease. Congress explicitly recognized this medical consensus when it enacted and extended the Comprehensive Alcoholism Act, S. Rep. No. 103, 96th Cong., 1st Sess. 3-4, *reprinted in* 1979 U.S. Code Cong. & Ad. News, 2681, 2682-83. Despite the difficulty of making an accurate diagnosis of primary versus secondary alcoholism (*supra*, pp. 7-8), and despite the persuasive body of medical evidence demonstrating that factors entirely outside the control of the individual, such as genetic predisposition, play a crucial role in the development of primary alcoholism in many individuals, the Veterans' Administration has persisted in adhering to a *per se* rule that irrebuttably presumes that any veteran who is diagnosed as a primary alcoholic has engaged in willful misconduct. On the basis of that rule alone, petitioners were denied educational assistance benefits by the VA.

SUMMARY OF ARGUMENT

This case requires the Court to apply Section 504 to extensions of educational benefits that have been denied on the basis of a Veterans' Administration regulation which conclusively treats primary alcoholism as willful misconduct. Millions of Americans suffer from primary alcoholism, not only from the debilitating effects of the disease, but also from the moral stigma that many in society still attach to those who are diagnosed as alco-

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[7] The advance in medical understanding of alcoholism in the past two decades is remarkable. In the words of a physician who has extensive experience treating alcoholism, "[w]e have learned more in the past 15 years about the disease of chemical dependency than in the past 5000 years." Talbott, *Alcoholism and Other Drug Addictions: A Primary Disease Entity*, 75 J. Med. Assn. Ga. 490 (August 1986).

holic. The causes and manifestations of alcoholism are diverse and vary greatly from individual to individual. Nevertheless, the VA refuses to treat primary alcoholics as individuals and instead categorically denies them extended educational benefits in clear disregard of Section 504's non-discrimination mandate.

As this Court recently reiterated in *School Board of Nassau County* v. *Arline*, No. 85-1277, slip op. (March 3, 1987), Section 504 was enacted to protect the handicapped against discrimination stemming from prejudice, fear and stereotype. In order to achieve this goal, Section 504 requires federal agencies to make reasonable, individualized medical judgments as to whether an individual is handicapped and "otherwise qualified" for a benefit. Furthermore, both the Attorney General and the Congress have made clear that Section 504 requires that individualized determinations be made concerning persons impaired by alcoholism.

However, neither petitioner in this case was permitted to present individualized evidence to the Veterans' Administration concerning the origins of his disease in order to show that there has been no willful misconduct. Despite the fact that both petitioners were handicapped and otherwise qualified within the meaning of Section 504 for extended educational benefits, both were automatically deemed ineligible for such benefits on the basis of an administrative rule that conclusively deems their primary alcoholism to have been caused by willful misconduct. Under the VA's rule, once a veteran is diagnosed as suffering from primary alcoholism, he or she is prevented from putting on any evidence that the cause of that alcoholism was not willful misconduct. This rule reflects nothing more than outdated attitudes towards, and fear of, alcoholism. It is also contrary to the great weight of contemporary medical evidence which views alcoholism as a disease of complex etiology that is often not the product of volition.

The court of appeals contends that this *per se* rule does not conflict with Section 504's clear prohibition against discrimination based on alcoholism because the rule looks to "conduct" rather than "handicap." This "distinction" between alcoholism as disease and alcoholism as conduct is invalid under Section 504 because it permits the VA to define as "conduct" what is in fact a handicap. If the agency is then permitted to prevent any proof that the individual did not engage in any willful misconduct, a handicapped individual will have lost by administrative fiat all the protections which Congress sought to provide by enacting Section 504.

Furthermore, no deference is owed to the VA's presumption that *all* primary alcoholism is the result of volitional conduct. The VA has never reconsidered its *per se* rule in light of Section 504's mandate of individualized decisionmaking. Thus, there is no administrative basis for the VA's approach other than a *post hoc* rationalization developed by counsel on appeal and not relied upon by the agency itself. No deference should be accorded to such *post hoc* rationalization.

ARGUMENT

I. SECTION 504 REQUIRES INDIVIDUALIZED DETERMINATIONS ABOUT WHETHER AN INDIVIDUAL WHO SUFFERS—OR WHO HAS SUFFERED—FROM THE DISEASE OF ALCOHOLISM IS "HANDICAPPED" AND "OTHERWISE QUALIFIED"

As this Court reiterated last term in *School Board of Nassau County* v. *Arline*, No. 85-1277, slip op. (March 3, 1987) ("*Arline*"), Congress enacted Section 504 to protect the handicapped against discrimination stemming from prejudice, fear and stereotype which was often based on "archaic attitudes and laws." *Arline*, slip op. at 4 quoting from S. Rep. No. 1297, 93rd Cong., 2d Sess.

50 (1974). The statutory language, legislative history, implementing regulations and decisions of this Court make clear that the key to achieving this goal is an *individualized* assessment—based on the facts relevant to the allegedly handicapped person—of whether the individual is or was handicapped and is "otherwise qualified" for a benefit.

The express language of Section 504 emphasizes that no "otherwise qualified handicapped *individual*" shall be discriminated against on the basis of his handicap. 29 U.S.C. § 794 (emphasis added). A "handicapped individual" is defined in the statute as

> "*any person* who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B) (emphasis added).

Similarly, the legislative history of Section 504 clearly shows that Congress wanted individualized assessments on the issues of "handicap" and "otherwise qualified" in order to avoid unthinking or outmoded decisions based on the myths and stereotypes which had unfairly shackled the handicapped in the past. *Arline*, slip op. at 11. As the key Senate Report stated,

> "The public lacks adequate knowledge about the potential of these [handicapped] individuals to contribute significantly to society. Too often we *automatically* make the assumption that nothing can be done. . . . *It is against the basic tenets of the scientific process to make an assumption of no hope and no help.* No less should be true of public policy. In the case of individuals with handicaps, making this assumption all too often has resulted in the violation of their basic rights as human beings and has condemned them to live useless lives." S. Rep. No.

1297, 93rd Cong., 2d Sess. 50 (1974) (emphasis added).[8]

The regulations implementing Section 504 which were promulgated in 1977 by the then Department of Health, Education and Welfare also emphasize the importance of individualized assessments. 42 Fed. Reg. 22676 (1977); 45 C.F.R. § 84.3(j). See also *Arline*, slip op. at 5 ("In determining whether a *particular individual* is handicapped as defined by the Act, the regulations promulgated by the Department of Health and Human Services are of significant assistance.") (emphasis added).[9] The definitions of a "physical or mental impairment," 45 C.F.R. § 84.3(j)(2)(i), "major life activities," 45 C.F.R. § 84.3(j)(2)(ii), and "otherwise qualified," 45 C.F.R. § 84.3(k), clearly indicate that these fundamental inquiries required by the statute are to be conducted on a case-by-case, person-by-person basis.

This Court's *Arline* decision underscores the importance of individualized inquiries into facts relating to individuals who have been handicapped, like petitioners here, by a disease, albeit in *Arline* the disease was contagious. With respect to the issue of whether a person is handicapped, this Court noted that Congress sought to counter "society's accumulated myths and fears about disability and disease." *Arline*, slip op. at 9. The Court emphasized that:

> "The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps

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[8] This language related specifically to the need for a national conference mandated by the same legislation which broadened the definition of "handicapped individual." But the passage expresses the general Congressional policy which underlies Section 504.

[9] This Court has recognized that the regulations were drafted with the "oversight and approval of Congress, see *Consolidated Rail Corporation* v. *Darrone*, 465 U.S. 624, 634-635, and nn.14-16 (1984); they provide 'an important source of guidance on the meaning of § 504,' *Alexander* v. *Choate*, 469 U.S. 287, 304, n.24 (1985)." *Arline*, slip op. at 5.

with actions based on reasoned and medically sound judgments . . . ." *Id.* at 10.

Accordingly, the Court concluded that mere contagion would not automatically remove an individual from the definition of "handicapped individual" and each case should be "evaluated in light of medical evidence" and other relevant facts to determine if the person was indeed handicapped within the meaning of the statute. *Id.* at 11. Similarly, the Court stressed that, with respect to the issue of whether a person with a disease was "otherwise qualified" for a particular benefit, the decisionmaker should "conduct *an individualized inquiry* and make appropriate findings of fact" relevant to the specific person. *Id.* at 12 (emphasis added). The Court stated that:

> "Such an [individualized] inquiry is essential if § 504 is to achieve its *goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes or unfounded fear . . . .*" *Id.* (emphasis supplied.)

Finally, both the Attorney General and the Congress have made clear that individualized determinations are to be made under Section 504 with respect to persons impaired by alcoholism. In 1977, responding to a request from the Secretary of HEW, the Attorney General issued an opinion concluding that alcoholics could be "handicapped" and "otherwise qualified" within the meaning of the statute, depending on the facts relating to each individual. 43 Op. Att'y Gen. No. 12 (April 12, 1977). In words with prophetic import for this case, the Attorney General stated,

> ". . . [A] person could not be refused service solely because he is or has a record of being . . . [an] alcoholic . . . .
>
> ". . . [T]he statute requires that . . . [affected government agencies] not automatically deny employment or benefits to persons solely because they might

> find their status as alcoholics . . personally offensive." *Id.* at 12-13.

As this Court stated in *Arline*, slip op. at n.14, Congress in 1978 recognized that government agencies might have "legitimate reasons not to extend jobs or benefits to . . . alcoholics, but also understood the danger of improper discrimination against such individuals if they were categorically excluded from coverage under" Section 504. Thus, Congress rejected a House proposal to exclude alcoholics from Section 504's protection and instead reiterated the need for individualized determinations on the issues of "handicap" and "otherwise qualified." *Arline* slip op. at n.14, citing 124 Cong. Rec. 30322 (1978). See also 43 Op. Atty. Gen. No. 12 (1977).

* * * *

There appears to be no serious dispute in this case that petitioner McKelvey is both "handicapped" and "otherwise qualified" within those statutory terms as construed by this Court.[10] Surely if Ms Arline was a handicapped individual due to her single hospitalization, *Arline*, slip op. at 6-7, then petitioner McKelvey, who was hospitalized 33 times for alcoholism (No. 86-737, C.A. App. 30-32) is also a handicapped individual. See 29 U.S.C. § 706(7)(B)(ii) (person "handicapped" if he has a

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[10] Similarly, there is no dispute in *Traynor* that petitioner is both "handicapped" and "otherwise qualified" within the meaning of the statute. The district court found that Traynor began drinking to intoxication when he was between eight and ten years old, that he drank heavily during his military service, and that he was hospitalized five times between 1970 and 1974 for "treatment for saturated alcoholic disorders." No. 86-622, Pet. App. 44a-45a. After his last hospitalization, Traynor joined Alcoholics Anonymous and has not had a drink since February, 1974. *Id.* at 46a. Therefore the court found that he was alcoholic and a "handicapped individual" within the meaning of Section 504. *Id.* at 74a. The court further found that Traynor was "otherwise qualified," having been honorably discharged from the armed services and having subsequently enrolled in a degree program in mechanical engineering at the City College of New York. *Id.* at 46a-47a, 75a-76a.

record of an impairment which has substantially limited major life activities). Similarly, at the time that he applied for an extension of VA education benefits, petitioner McKelvey was successfully treated for alcoholism and was able to meet "the academic and technical standards requisite to admission or participation in the recipient's education program or activity." See 38 C.F.R. § 18.403(k)(3) (VA definition of "otherwise qualified") for educational benefits incorporating HHS regulation. 45 C.F.R. § 84.3(k)(3). No. 86-737, Pet. App. 43a (McKelvey "otherwise qualified"). Indeed, although it felt bound to deny petitioner McKelvey an extension due to the *per se* effect of the regulation at issue here, the Board of Veterans Appeals stated clearly that there is "no doubt that if an extension were granted [McKelvey] would use the benefits wisely and become a more productive member of society." *Id.* at 29a. To deny petitioners this beneficial opportunity on the basis of an arcane regulation which stereotypes alcoholics is plainly inconsistent with Section 504.

II. THE VETERANS' ADMINISTRATION'S DETERMINATION THAT PRIMARY ALCOHOLISM IS "WILLFUL MISCONDUCT" PER SE IS INVALID UNDER SECTION 504

The Veterans' Administration has by regulation and administrative interpretation conclusively determined that primary alcoholism is the result of willful misconduct. See pp. 11-13, *supra*. Thus, an individual whose alcoholism is not found to have been caused by a psychiatric disorder or whose alcoholism has not led to an underlying organic disorder (such as cirrhosis) is automatically ineligible for an extension of time in which to receive educational benefits that otherwise would be allowed for a disability pursuant to 38 U.S.C. § 1662(a)(1). This *per se* administrative rule, which prevents petitioners from presenting evidence from their own personal case histories to prove that their primary alcohol-

ism was not caused by willful misconduct, is clearly invalid under Section 504.[11]

As noted above, Section 504 was enacted to prevent categorical exclusion of handicapped individuals from federal programs and to ensure that decisions were based on the facts of each individual case. Section 3.301(c)(2) is just such an unlawful categorical rule. As interpreted by the Veterans' Administration, the regulation prevents primary alcoholics from putting on any evidence that the cause of that alcoholism was not willful misconduct. Such an outdated view is contrary to the great weight of contemporary medical evidence which views primary alcoholism as a disease with complex genetic, psychological, social and familial origins. See pp. 5-8, *supra*. Although the origins of primary alcoholism are not entirely clear and may differ in individual cases, it does not follow that primary alcoholism is thus necessarily caused by willful misconduct in each individual case. *Id.*[12] Under fundamental principles of Section 504, an individual claimant suffering from primary alcoholism should at least have the opportunity to present evidence that the disease was not the product of "willful misconduct." Thus, the Veterans' Administration's interpretation of 38 C.F.R. § 3.301(c)(2) is clearly unlawful.

The D.C. Circuit's broad assertion (No. 86-737, Pet. App. 14a) that the Veterans' Administration was not dis-

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[11] The Veterans' Administration does not dispute that its educational benefits program is subject to the limitations and requirements of Section 504. *See* 38 C.F.R. Part 18, Subp. D., App. A.

[12] The VA is misusing the primary-secondary distinction. That distinction has nothing to do with whether the individual's alcoholism is necessarily volitional. The VA's interpretation of "willful misconduct" also assumes incorrectly that it is always possible to differentiate between "primary" and "secondary" alcoholism. This assumption is manifestly incorrect. *See* pp. 6-8, *supra*. Moreover, in light of the real possibility that a given veteran may not receive an accurate diagnosis of primary as opposed to secondary alcoholism (*see supra* pp. 7-8), it would be manifestly unfair to deny benefits solely on the basis of this diagnosis.

criminating against petitioner McKelvey "solely by reason of his handicap" but rather on the basis of his "conduct" simply begs the question whether the conduct was the result of disease or the result of willfulness. That must be a question of fact in each individual case, given the complexity of alcoholism and the numerous individual manifestations of the disease. Indeed, the court of appeals' conclusory point was effectively rejected by this Court in *Arline*. The Court did not accept the contention of the United States that the effect of a disease on others could be separated from the effect of the disease on the handicapped individual in order to allow irrational discrimination by federal fund recipients based on fear of contagiousness. As this Court stated,

> "Arline's contagiousness and her physical impairment each resulted from the same underlying condition, tuberculosis. It would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment." *Arline*, slip op. at 7.

Similarly, it would be "unfair" to deny petitioners an extension of the time for receiving education benefits based upon a distinction between the disease and conduct which may be part of the disease. *Arline* thus compels rejection of the court of appeals' blanket view that a person with primary alcoholism may automatically be denied an extension because of his or her "conduct."

The court of appeals has done clear violence to the intent of Congress in Section 504 by holding that the decision whether primary alcoholism is "willful misconduct" is not a "medical judgment" but should be decided on the basis of "general societal perceptions regarding personal responsibility." No. 86-737, Pet. App. 12a. It is precisely these kinds of perceptions which Congress concluded should not serve as the basis for denying someone who is handicapped by a disease the benefits of a federally conducted program or activity. This is not to say that

conduct relating to the consumption of alcohol is not or can never be "willful misconduct," but it does mean that the VA is precluded from concluding that all primary alcoholism is volitional, regardless of the veterans' proffered evidence to the contrary.[13]

Nor is there any basis, under a proper reading of Section 504, for the court of appeals' view that deference is owed to the "reasonableness" of the agency's view that primary alcoholism is *always* the result of "willful misconduct." No. 86-737, Pet. App. 11a.[14] The origins of 38 C.F.R. § 3.301(c)(2) go back nearly 60 years to the Prohibition era.[15] There has been no analysis by the VA in the modern era of the changed medical views concerning alcoholism, including the policy statements of *amici* American Medical Association and American Psychiatric Associa-

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[13] There is no reason for the Court in this case to attempt to sort out what types of conduct related to alcohol consumption can properly be deemed "willful misconduct." Once the Court holds that some primary alcoholism is not "volitional," then the VA should evaluate on a case-by-case basis whether the veteran seeking benefits has in fact willfully become or remained an alcoholic. In this case, petitioners offered evidence showing that their alcoholism in effect started when they were teenagers or even younger and was in large part encouraged by their families at that time. If so, it would be unwarranted to conclude that their alcoholism was the product of volition, much less that it was a consequence of any "willful misconduct."

[14] Moreover, the concern of the court of appeals that an individualized interpretation of willful misconduct would interfere with the VA's ability to administer its disability program is unfounded. No. 86-737, Pet. App. 26a. There might be circumstances in which the VA could find that a veteran was not "otherwise qualified" due to his "willful misconduct," if, for example, in conjunction with other factors supporting a finding of willful misconduct, the VA found that an alcoholic had been informed about his illness by a professional and informed about the need for treatment, yet he nevertheless declined to seek any treatment which might permit him to control his illness. Such a rule would provide significant incentive for alcoholic veterans to seek treatment which, if successful, would end their need for disability benefits.

[15] *See* p. 12, *supra*.

tion that alcoholism is a disease with complex origins, which cannot be dealt with categorically as willful. There has been no administrative record concerning alcoholism developed by the Veterans' Administration since Section 504 was enacted, even though the statute clearly requires careful analysis of contemporary knowledge about handicapping diseases and individualized decisionmaking in the context of such an analysis. Thus, the purported "reasonableness" of the agency's categorical interpretation is supported factually by nothing more than a single footnote in the agency's appellate brief. No. 86-737, Pet. App. 11a, citing Br. of Respondent Turnage at pp. 18-19 n.4. This kind of *post hoc* rationalization will not suffice to justify disregarding the mandate of Section 504 to provide individualized evaluations of the medical condition of handicapped individuals who are being denied benefits. *Cf. Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962). Under Section 504, an agency must, at a minimum, analyze the available evidence about a given handicap before setting policy for making individualized determinations as to that handicap.[16]

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[16] This Court need only decide in this case that the VA's administrative interpretation is invalid under Section 504. It need not decide whether there is an inherent and irreconcilable conflict between Section 504 and 38 U.S.C. § 1662(a)(1). There is no indication that Congress clearly incorporated the Veterans' Administration's willful misconduct regulation when it reenacted the statutory time prescription of 38 U.S.C. § 1662(a)(1). As Judge Ginsburg ably demonstrated in her dissent in *McKelvey*, the legislative history of Section 1662(a)(1) is at best ambiguous in referring to VA standards for determining "willful misconduct." No. 86-737, Pet. App. 23a-24a. Moreover, it is the VA's administrative interpretation of its regulation that creates the direct conflict with Section 504. The Senate Report language relied upon by the VA indicates congressional concern that the same standards be applied in all VA programs for determining when a disability is the result of willful misconduct. The Senate Report language clearly cannot be construed to indicate congressional incorporation of every administrative interpretation of all related VA regulations.

[Footnote continued]

Accordingly, assuming no jurisdictional bar,[17] the cases should be remanded to the Veterans' Administration with instructions to allow petitioners to introduce evidence that their alcoholism was not caused by their own willful misconduct.

CONCLUSION

For the reasons stated above, the American Medical Association and the American Psychiatric Association respectfully request that this Court declare invalid, under Section 504, 38 C.F.R. § 3.301(c)(2) as interpreted and applied by the Veterans' Administration.

Respectfully submitted,

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May 28, 1987

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[16] [Continued]

Finally, under traditional principles of statutory construction, whenever two statutes are capable of being construed harmoniously by looking to the plain meaning of each, that plain meaning should be given effect to avoid conflict. *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981) ("We must read the statutes to give effect to each if we can do so while preserving their sense and purpose," *citing Morton* v. *Mancari*, 417 U.S. 535, 551 (1974)). The administrative interpretation by the Veterans' Administration would lead to just such an unnecessary conflict, and accordingly should be rejected.

[17] *Amici* take no position on the jurisdictional issues in this case.

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Nos. 86-622 and 86-737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EUGENE TRAYNOR,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS AND VETERANS' ADMINISTRATION,

Respondent.

JAMES P. MCKELVEY,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS AND VETERANS' ADMINISTRATION,

Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Second Circuit and the Circuit for the District of Columbia

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QUESTION PRESENTED

Whether, under section 211(a) of the Veterans' Benefits Law, 38 U.S.C. § 211(a), the federal courts have jurisdiction to review and set aside regulations promulgated and policies adopted by the Veterans' Administration that are in excess of or contrary to the agency's authority under the Veterans' Benefits Law or other provisions of federal law.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

Nos. 86-622 and 86-737

EUGENE TRAYNOR,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS AND VETERANS' ADMINISTRATION,

Respondent.

JAMES P. MCKELVEY,

Petitioner,

v.

THOMAS K. TURNAGE, ADMINISTRATOR OF VETERANS' AFFAIRS AND VETERANS' ADMINISTRATION,

Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Second Circuit and the Circuit for the District of Columbia

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BRIEF AMICUS CURIAE OF VIETNAM VETERANS OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE [1]

This brief is filed on behalf of the Vietnam Veterans of America ("Vietnam Veterans") in support of peti-

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[1] Pursuant to Rule 36 of the Supreme Court Rules, written consent to file this brief has been obtained from counsel of record for all parties. The letters of consent have been filed with the Clerk of the Court.

tioners. Vietnam Veterans is the largest national service organization devoted exclusively to serving the interests and addressing the concerns of veterans who served in the military during the Vietnam era. A non-profit organization founded in 1978 and chartered by an Act of Congress, Vietnam Veterans has a membership of 35,000 with 295 chapters nationwide.

The interest of Vietnam Veterans in the present litigation is to ensure that section 211(a) of the Veterans' Benefits Law, 38 U.S.C. § 211(a), be read in accordance with its express terms and with Congress' intent to preclude judicial review only of Veterans' Administration ("VA") decisions in individual benefits claims cases.[2] Vietnam Veterans' purpose in seeking a ruling that section 211(a) has limited preclusive effect is to guarantee that the VA not be allowed to act contrary to its statutory authority in the promulgation of regulations and adoption of policies affecting millions of Vietnam era and other veterans.

Vietnam Veterans, through Vietnam Veterans of America Legal Services, offers many different kinds of assistance to its members ranging from legal representation in VA proceedings to the publication of educational materials. One of the most important objectives of Vietnam Veterans is to ensure that the VA acts consistently with the provisions of the Veterans' Benefits Law. As part of this effort, Vietnam Veterans has served as coun-

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[2] Vietnam Veterans believes that section 211(a) does not bar review of those Veterans' Administration actions that the agency itself has described as "its regulations and substantive agency actions of broad application." *See H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the Committee on Veterans' Affairs, House of Representatives*, 99th Cong., 2d Sess., Vol. II, 328 [hereinafter cited to as "1986 House Hearings"]. For purposes of this brief, Vietnam Veterans refers to these categories of Veterans' Administration actions as "regulations and policies."

sel for individual veterans and groups of veterans seeking judicial review of the validity of important VA regulations and policies that affect many of its members. One of the policies that Vietnam Veterans has challenged in litigation is the same one challenged in the cases now before this Court. Vietnam Veterans has been acting as co-counsel in *Buck v. Veterans Administration*, No. CV-86-3522 (E.D. Pa. Oct. 16, 1986) (order dismissing complaint), *appeal docketed*, No. 86-1656 (3rd Cir. Oct. 28, 1986), a case in which the plaintiff has challenged the validity of the VA policy that excludes certain veterans disabled by alcohol from participation in the veterans pension program. The district court dismissed the complaint in *Buck* on the ground that the court was precluded from hearing the case by section 211(a). On appeal the Third Circuit has stayed proceedings in *Buck* pending the outcome of the cases currently before this Court. Vietnam Veterans urges this Court to sustain petitioners' challenges on the merits to the VA alcoholism policy, as well as to adopt a reading of section 211(a) that will permit judicial review of such policies and regulations.

In Vietnam Veterans' experience, section 211(a) is the critical statutory provision in determining whether or not the Veterans' Administration will be held accountable to apply the provisions of the Veterans' Benefits Law and other federal statutes rationally and fairly. Simply put, if section 211(a) is construed broadly to prohibit court review of Veterans' Administration regulations and policies that are arguably unlawful, the Veterans' Administration will be largely unconstrained in implementing its own will, rather than that of Congress. The narrower reading of section 211(a) advocated by Vietnam Veterans here would allow veterans' rights groups, like Vietnam Veterans and other interested parties, to resort to the courts to ensure that, at least on the level of regulations and policies, the Veterans' Administration actually implements the will of Congress.

SUMMARY OF ARGUMENT

The jurisdictional issues presented by these consolidated cases are the subject of sharply conflicting decisions by the courts of appeals. As a result of the existing disarray in judicial interpretation of section 211(a), critical issues affecting thousands of veterans may be totally insulated from judicial review. That result is neither required nor intended by section 211(a).

Section 211(a) of the Veterans' Benefits Law clearly precludes federal court review of Veterans' Administration decisions on individual veterans' claims for benefits provided under the Veterans' Benefits Law. The statute does not preclude judicial review of the validity of Veterans' Administration regulations and policies of broad application. Any attempt to construe section 211(a) more broadly must be rejected in light of the strong presumption that final agency action is reviewable unless there is "persuasive reason to believe" that Congress intended to bar such review. *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2135 (1986). This presumption can be overcome only by specific language barring review, or by a strong showing of congressional intent, based on specific legislative history, or through the legislative scheme of the statute. None of these indicators of congressional intent to bar judicial review exists in the case of section 211(a).

First, the language of section 211(a) does not reveal a congressional intent to prohibit judicial review of the validity of VA regulations and policies. Instead, the language of the statute only bars review of VA "decisions" on claims of individual veterans for benefits. Second, the legislative history of section 211(a) confirms that the congressional intent to preclude judicial review extends only to adjudication of individual benefits claims. The statutory language of the precursors of section 211(a) indicates that there was to be no review of individual benefits determinations. The various alterations made to

the language of the "limited review" provision were not intended to and did not alter the original scope of section 211(a). Post-enactment congressional consideration of the statute has also relied on an interpretation of section 211(a) which allows for judicial review of the validity of VA regulations and policies. This reliance has been fostered by the position taken by the Veterans' Administration, which has consistently maintained before Congress that section 211(a) does not need to be amended because it does not bar review of the validity of VA regulations and policies of broad application.

Finally, the purposes underlying section 211(a), as identified by this Court in *Johnson v. Robison*, 415 U.S. 361 (1974), would not be served by construing the statute to bar judicial review of VA regulations and policies of broad application. Judicial review of the validity of regulations would not overload the courts with cases concerning veterans benefits. The validity of a regulation affecting *all* veterans can be readily established, typically in a single litigation. The small number of judicial challenges to VA regulations presented to those federal courts authorizing review of VA regulations and policies under section 211(a) supports this conclusion. In addition, judicial review of the validity of regulations and policies would not intrude upon VA decision making. The validity of regulations is a matter clearly within the competence of the federal courts, and those courts can defer to the agency's expertise by exercising a more lenient standard of review where circumstances so warrant.

ARGUMENT

I. THE TRAYNOR COURT'S OVERLY BROAD READING OF SECTION 211(a) THREATENS TO PRECLUDE JUDICIAL REVIEW OF ISSUES OF GREAT CONCERN TO VETERANS

By its own terms, section 211(a) prohibits review of decisions of the VA regarding individual veterans' entitlement to benefits. Irreconcilable conflicts now exist, however, as to whether section 211(a) has any preclusive effect on judicial review of VA determinations other than individual benefits decisions. In the wake of this Court's decision in *Johnson v. Robison*, 415 U.S. 361 (1974), four courts of appeals have held that section 211(a) does not bar review of VA regulations or other VA policies of broad application. Other courts of appeals—including the Second Circuit in the case now before this Court—have taken exactly the opposite position, broadly construing section 211(a) to immunize virtually every action of the VA from judicial scrutiny.[3]

This sharp conflict creates an untenable situation in which veterans' ability to challenge the rules and policies that govern their statutory right to benefits is not determined by jurisdictional principles and congressional intent, but by the location of the court in which the claim arises. As a result of the existing disarray in judicial interpretation of section 211(a), significant challenges to VA actions of broad import may go unheard and the VA

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[3] Although the case of petitioner McKelvey does not directly raise the judicial review issue, it illustrates the need for a uniform and reasoned approach to review of VA regulations and policies. The Court of Appeals for the District of Columbia stated that in making its decision it did not "pass on whether [section] 211(a) precludes review of veterans' benefit regulations to determine whether they exceed the VA's statutory authority" because under the peculiar circumstances of that case such a determination was unnecessary. 792 F.2d 194, 199 (D.C. Cir. 1986). The *McKelvey* court's resolution of the jurisdictional question provides little guidance as to the scope of 211(a).

may avoid any obligation to conform its rules and policies to congressional directives.

The conflict as to the scope of section 211(a) has been heightened by the VA itself. While repeatedly testifying before congressional committees that the statute does not bar review of VA regulations and policies, the VA has taken a directly contrary position in the courts, insisting—as in the instant cases—that VA regulations and policies are immune from judicial review.

The need for a determination by this Court as to the precise scope of section 211(a) is clear and urgent. The cases now before this Court, and in particular the Second Circuit's decision in *Traynor*, provide a vehicle for resolving the conflict between the circuits and removing the need for continuous relitigation of the scope of section 211(a). This Court should not delay in providing the lower courts with clear direction as to the proper interpretation of this statute.

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Section 211(a) of the Veterans' Benefits Law, 38 U.S.C. § 211(a) (1982), is a "limited review" provision. Section 211(a) provides in relevant part:

> the *decisions* of the Administrator on *any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans* and their dependents and survivors shall be final and conclusive and no . . . court . . . shall have power or jurisdiction to review any such decision . . . .

38 U.S.C. § 211(a) (emphasis added).

The provision was clearly designed to exempt some VA actions from judicial scrutiny. It has long been accepted that judicial review of adjudications of the benefits claims of individual veterans is precluded by section 211(a). *Walters v. National Association of Radiation Survivors*, 473 U.S. 305, 307 (1985); *Johnson v. Robison*,

415 U.S. at 367. This preclusion is evident from the language of section 211(a).

However, as this Court announced in *Johnson v. Robison*, not all actions of the Veterans' Administration are rendered immune from judicial review by section 211(a). That case involved a challenge to the constitutionality of veterans' benefits legislation. Emphasizing that the language of the statute did not present an explicit bar to the judicial review of such challenges, this Court examined both the legislative history and the purposes of the statute in order to determine the scope of section 211(a). This Court concluded that a decision arises under a law administered by the VA only if it "is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts," strongly suggesting that section 211(a) applies only in the case of individual benefits adjudications. This Court also concluded that section 211(a) restricted review only of those decisions of law or fact arising in the VA's administration of a statute providing for veterans' benefits. *Id.*

Following *Johnson v. Robison*, several courts of appeals applied this Court's analysis of section 211(a) to authorize judicial review of the validity of VA regulations and policies. In *Wayne State v. Cleland*, 590 F.2d 627 (6th Cir. 1978), the Sixth Circuit considered a claim by a university and a class of veteran students that certain VA regulations governing educational benefits had been promulgated without statutory authority. The Sixth Circuit relied closely on this Court's rationale in *Johnson v. Robison* in finding that section 211(a) had only limited preclusive effect. The court observed that suits challenging the authority of the VA to promulgate regulations would neither involve the courts in complex and technical VA policy issues nor create suits requesting "federal courts to second guess the Administrator on the merits of particular claims for benefits or the termination of such benefits." 590 F.2d at 631. The Sixth Cir-

cuit reasoned that to construe section 211(a) broadly would be to find that Congress had intended to allow the VA to define the limits of its own authority. The court refused to endorse such a construction, which it believed would raise serious doubts about the constitutionality of section 211(a). *Id.* at 632.

Faced with suits challenging the same or similar educational benefit regulations, three other circuit courts adopted the reasoning of *Wayne State*. The Eighth, Ninth and Fourth Circuits concluded that section 211(a) was designed to preclude judicial review of VA decisions on individual benefit claims but not to bar judicial review of regulations promulgated by the VA. *See Merged Area X (Education) v. Cleland*, 604 F.2d 1075 (8th Cir. 1979); *Evergreen State College v. Cleland*, 621 F.2d 1002 (9th Cir. 1980); *University of Maryland v. Cleland*, 621 F.2d 98, 101 (4th Cir. 1980).

This consensus regarding the scope of section 211(a) was broken by the decision of the District of Columbia Circuit in *Gott v. Walters*, 756 F.2d 902 (D.C. Cir.), *vacated and reh'g granted*, 791 F.2d 172 (D.C. Cir.) (*en banc*), *remanded with instructions to dismiss as moot*, 791 F.2d 172 (D.C. Cir. 1985) (*en banc*), in which that court ruled that section 211(a) *expressly* precludes judicial review of the VA's regulations and their promulgation.[4] Although the *Gott* decision was later vacated, its reasoning was adopted by the Federal Circuit in *Roberts*

[4] The district court in *Gott* had held that section 211(a) did not bar review of the VA's promulgation of rules and policies, and the litigation before the Court of Appeals focused on the merits of the case. A sharply divided panel of the District of Columbia Circuit, however, held over a strong dissent that virtually every action or determination of the VA was immune from judicial review. The *Gott* plaintiffs sought rehearing of the jurisdictional issue, and the court vacated the panel's decision and agreed to rehear the case *en banc*. Prior to rehearing, however, the case was settled, with the VA agreeing to grant substantial relief on the merits to the plaintiff veterans, and the *en banc* court dismissed the appeal as moot.

v. Walters, 792 F.2d 1100 (Fed. Cir. 1986) (constitutional challenges the sole exception to the preclusive effect of section 211(a)).

Most recently, the case of petitioner Traynor presented the Second Circuit with the question whether section 211(a) precludes judicial review of VA regulations for compliance with other federal statutes. The Second Circuit adopted the broadest possible reading of section 211(a) and determined that the statute precludes review of VA regulations and policies, even in the face of claims that they contravene clear requirements of federal law. The court was led to this erroneous conclusion by its assumption that Traynor's allegations constituted no more than a challenge to the Administrator's denial of his benefits claim.[5] In fact, however, Traynor did not challenge the application of the alcoholism policy to the particular facts of his case. Instead, he asserted a broad-based cause of action seeking a declaration that the alcoholism policy violated both the governing statute and the Constitution. The *Traynor* court's failure accurately to evaluate the procedural posture of the case caused it to deny review of the VA's alleged *ultra vires* acts.

Following upon the narrow reading given section 211(a) in the Fourth, Sixth, Eighth and Ninth Circuits, the *Traynor* line of cases has raised a clear and pressing question as to the scope of section 211(a). No disagreements exist among these courts as to the effect of section 211(a) on individual benefits determinations. Where the veteran challenges the factual findings of the Admin-

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[5] The *Wayne State* line of cases cannot properly be distinguished from *Traynor* on the ground that they involved "broad challenges to the validity of a VA regulation brought by educational institutions interested in the overall administration of the VA educational benefits program." *Traynor*, 791 F.2d at 230. Both the *Wayne State* and *Merged Area X* cases had individual veterans as well as university plaintiffs challenging the VA regulations at issue. Moreover, section 211(a) clearly provides no authority for distinguishing among plaintiffs eligible to challenge VA actions.

istrator as to the veterans' entitlement to benefits, the courts of appeals agree that judicial review is barred. Similarly, if the veteran challenges the Administrator's interpretation of a statute or regulation as applied to an individual benefits determination, the courts of appeals also agree that there is no judicial review as to that "decision[ ] . . . of law." Also, in light of this Court's decision in *Johnson v. Robison*, the courts of appeals apparently agree that constitutional challenges to the VA's actions, regulations, and policies are subject to judicial review under section 211(a).

However, in clear conflict with the *Wayne State* line of cases, the *Traynor* line of cases would immunize every other act of the VA from judicial scrutiny. This expansive reading of section 211(a) is not authorized by the terms of the statute and is not supported by congressional intent or the policies underlying the statute. *See* Argument II, *infra*. Moreover, the *Traynor* analysis suffers from a critical failure to evaluate the procedural posture of challenges to VA actions and to consider the consequences if the VA is placed beyond any obligation to follow federal law. The superficial *Traynor* analysis of the scope of section 211(a) must therefore be rejected.

In resolving the conflict that now exists concerning the scope of 211(a), this Court should be guided by what the VA itself has repeatedly said in informing Congress that section 211(a) does not bar court review of challenges to VA regulations or other policies of broad application that are inconsistent with the Veterans' Benefits Law.[6] Accordingly, this Court should find that where it

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[6] The VA has taken this position in every recent hearing concerning legislation to limit the present scope of section 211(a). In 1982, the statement of the VA's Acting Administrator was that:

> We continue to believe that there should be access to the courts for challenges to the constitutionality of veterans' benefits legislation, regulations, and procedures. . . . In addition, we are cognizant of an emerging trend in several Federal district

is alleged that the VA has exceeded its authority in implementing the governing statute or has failed to implement that statute, court jurisdiction exists to review those allegations. Such litigation would not encompass review of VA decisions on individual benefits claims. Similarly, this Court should find that section 211(a) does not bar challenges to the methods by which the VA promulgates its regulations and policies. Such familiar challenges asserting basic rights to notice and comment do not impinge upon the interests protected by section 211(a).

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courts and courts of appeals toward permitting judicial review of allegations that a regulation was promulgated in excess of the Administrator's authority or otherwise contrary to law. This growing body of case law would seem to provide a sufficient basis for review of substantive agency actions of broad binding application, without the need for new legislation.

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In 1984, the VA took the same position during Congressional consideration of the Veterans' Dioxin and Radiation Exposure Compensation Standards Act of 1984:

> I continue to believe that VA regulations should be, and are, reviewable in the Federal courts. This principle was further explained by the Acting General Counsel last summer, when he indicated to the Committee that "legislation, regulations and procedures" are judicially reviewable, as are "substantive Agency actions of broad, binding application."
>
> Section 211(a) has been properly limited by the courts so that it does not protect every decision, policy, or action of the VA from judicial scrutiny. Those Agency rules and procedures of broad and binding application which affect the rights of a number of claimants to VA benefits are not protected by Section 211(a). The way the VA processes and decides an individual benefit claim is clearly beyond the reach of the Federal courts, however.

Letter from Robert Nimmo, VA Administrator, to Sen. Cranston, Chairman of the Senate Veterans' Affairs Committee (March 29, 1982), *reprinted in* 130 Cong. Rec. S6160 (daily ed. May 22, 1984).

Finally, this Court should find that section 211(a) erects no jurisdictional bar to claims that VA regulations and policies contravene federal statutes other than those that the VA is delegated to administer.

This functional analysis of the scope of section 211(a) is neither abstract nor advisory. The need for a precise evaluation of the scope of the statute is presented directly by the cases now before this Court. The need for a clear demarcation of the rights of veterans to judicial review is also illustrated by other pending challenges to VA actions.

For example, Vietnam Veterans and a number of individual plaintiffs have brought suit in another important case challenging the validity of VA regulations. The class in *Nehmer v. United States Veterans' Administration.* No. CV-86-6160 (N.D. Cal. filed Oct. 31, 1986), is challenging the actions of the Veterans' Administration in the establishment and implementation of an entire program mandated by Congress related to the Agent Orange controversy, the Veterans' Dioxin and Radiation Exposure Compensation Standards Act of 1984, 38 U.S.C. § 354 (a). In essence, plaintiffs contend that the VA has contravened the purpose of the Act by failing to implement its key provisions, threatening to deprive thousands of veterans exposed to Agent Orange during service in Vietnam of the benefits granted to them by the Act. This challenge to the VA's actions includes allegations that the VA violated express provisions of section 354(a), thereby acting beyond its statutory authority,[7] as well as the due

[7] The *Nehmer* plaintiffs have alleged that the VA violated express provisions of the Act and exceeded its statutory authority by: (1) failing to adopt guidelines for evaluating the scientific evidence relating to dioxin; (2) failing to make evaluations of the findings of scientific studies relating to dioxin exposure; (3) failing to provide administrative support services and fiscal support for the Committee charged with reviewing the scientific evidence; (4) failing to ensure that veterans were provided with the benefit of reasonable doubt concerning whether a particular disease was associated with the period of service.

process clause of the Constitution.[8] Under the broad reading of section 211(a) reflected in *Traymor*, the non-constitutional regulatory challenges of the *Nehmer* plaintiffs would be precluded from judicial review.

The implication of the *Traynor* decision—that the VA is uniquely free to ignore the mandate of any federal statute with impunity and without the restraint of judicial review—is irrational and unjust. It is essential that this Court address the implications of *Traynor* and in doing so provide the lower courts with guidance on the scope of section 211(a).

II. SECTION 211(a) OF THE VETERANS' BENEFITS LAW DOES NOT PRECLUDE JUDICIAL REVIEW OF THE VALIDITY OF REGULATIONS OR POLICIES

Any consideration of whether final agency action is subject to judicial review must begin with the strong presumption that Congress intends such review. Judicial review will not be precluded unless there is "persuasive reason to believe that such was the purpose of Congress." *Bowen v. Michigan Academy of Family Physicians*, 106 S. Ct. 2133, 2135 (1986), *quoting Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1976).[9] The burden of establishing this "persuasive reason" rests with the party seeking to limit judicial review. Clear and convincing evidence of an intent to bar review must

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[8] The Veterans' Administration has moved to stay the *Nehmer* proceedings pending a decision by this Court on the instant cases. That motion is currently pending before the United States District Court for the Northern District of California.

[9] This jurisdictional principle is established by a long line of this Court's decisions. *See, e.g., Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Tooahnippah v. Hickel*, 397 U.S. 598, 606 (1970); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 156-157 (1970); *Barlow v. Collins*, 397 U.S. 159, 166 (1970); *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962).

be presented before the courts may limit review. Where substantial doubt exists concerning congressional intent, the presumption favoring review is controlling. *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 778 (1985); *Block v. Community Nutrition Institute*, 467 U.S. 340, 349 (1984).

While not irrebuttable, the presumption in favor of judicial review may be overcome only by specific statutory language barring review, by specific legislative history that is a reliable indicator of congressional intent or by congresssional intent that is fairly discernible in the detail of the legislative scheme. *Block*, 467 U.S. at 349, 351. No convincing evidence exists to overcome the presumption in the case of section 211(a). Neither the language of the statute, the legislative history nor the purpose of section 211(a) provides any indication of a congressional intent to preclude judicial review of the validity of VA regulations or policies.

A. The Language of Section 211(a) Evidences Its Limited Preclusive Effect

Any attempt to read section 211(a) as broad enough to bar judicial review of all VA actions runs counter to the language of the statute. Section 211(a) prohibits judicial review of "decisions . . . on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans. . . ." 38 U.S.C. § 211(a). The statutory provision does not expressly preclude judicial review of the validity of VA regulations or policies. On the contrary, the use of the word "decisions" indicates that Congress intended to bar judicial review only of individual benefits determinations.[10]

Such a reading of section 211(a) is consistent with this Court's decision in *Johnson v. Robison*, 415 U.S. 361 (1974). In *Johnson v. Robison*, this Court identified two elements of section 211(a) that require the provision to be construed as having limited preclusive effect. First,

the Court stated that a decision "arises under any law administered by the VA" within the meaning of section 211(a) only if it "is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts." 415 U.S. at 367. In other words, the language of section 211(a) should be interpreted to preclude the review of fact-based determinations made by the VA concerning individual benefits claims.

The fundamental flaw in the decision of the *Traynor* majority, as discussed above, was its assumption that petitioner Traynor's challenge to the alcoholism policy constituted a challenge to the VA's decision on his particular benefits claim. But when the VA promulgated its alcoholism policy, which was the sole focus of Traynor's court challenge, it was not applying "a particular provision of the statute to a particular set of facts."

The second restriction on the scope of section 211(a) established in *Johnson v. Robison* is that the statute only precludes judicial review of laws administered by the VA. 415 U.S. at 367. This second limitation is the basis for the reasoning of the dissent in the *Traynor* case. Judge Kearse reasoned that petitioner Traynor's challenge to the VA policy on alcoholism raised a question not under a law administered by the VA but under the Rehabilitation Act. 791 F.2d at 232-233. While this reasoning does provide a basis for jurisdiction in the cases now before this Court, there is no need for the Court to restrict its holding to the second prong of the *Johnson v. Robison* analysis. *Johnson v. Robison* clearly

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[10] In the context of the Veterans' Benefits Law, Congress has clearly differentiated between "decisions" issued by the VA and "regulations" adopted by the agency. Section 4004 of the Veterans' Benefits Law defines the authority of the Board of Veterans Appeals ("BVA") to make "decisions" concerning all veterans' appeals (38 U.S.C. § 4004(a)) and requires BVA in making such decisions to adhere to the "regulations" of the VA (38 U.S.C. § 4004(c)).

suggested that section 211(a) applies only to VA decisions involving individual benefits claims. This case provides an appropriate vehicle for confirming this aspect of *Johnson v. Robison* in order to dispel any uncertainty as to the scope of section 211(a).

B. The Legislative History of Section 211(a) Indicates Its Limited Preclusive Effect

There is no specific legislative history that manifests congressional intent to preclude review of the validity of VA regulations or policies. Indeed, the limited legislative history that does exist demonstrates that Congress intended that the preclusive effect of section 211(a) be limited to individual benefits determinations. This conclusion stems from an examination of the statutory precursors of section 211(a). While the relevant wording of the "limited review" provision has been changed two times since its original enactment, those changes were not meant to alter the scope of the provision as originally enacted. *Johnson v. Robison*, 415 U.S. at 368-374.

A "limited review" clause was included in section 5 of the statute that created the Veterans' Administration, the Economy Act of 1933, Pub. L. No. 73-2, § 5, 48 Stat. 8, 9 (1933). This provision precluded judicial review of "[a]ll decisions rendered by the Administrator under the provisions of [the Act] or the regulations issued pursuant thereto." This Court's interpretation of section 5 of the Economy Act was that it

> concerns *only grants* to veterans and their dependents—pensions, compensation, allowances, and special privileges, all of which are gratuities. The purpose of the section appears to have been to remove the possibility of judicial review in *that class of cases*. . . .

Lynch v. United States, 292 U.S. 571, 587 (1934) (emphasis added). This reading of section 5 suggests that

Congress intended to limit review only of decisions on individual *benefits* claims. While the statute contemplated that the VA would apply its regulations in reaching such non-reviewable decisions, it certainly did not indicate that such regulations themselves were immune from judicial review.

In 1940, the language of the "limited review" provision was changed significantly to clarify the original intent of the jurisdictional restriction. The 1940 language barred review of "decisions of the Administrator" on questions of law or fact concerning *"a claim* for benefits or payments." The use of the term "decisions" together with the word "claim" strongly suggests that only decisions on individual claims for benefits were to be barred from judicial review. In a complementary provision of the 1940 Act, Congress set forth the jurisdiction of the Board of Veterans Appeals ("BVA"). That provision gave the BVA jurisdiction over "all questions on claims involving benefits under the laws administered" by the VA. 38 U.S.C. § 4004(a). These parallel provisions allocated appellate functions between the BVA and the courts. The BVA was given jurisdiction over all benefits claims decided in the first instance by VA regional offices—precisely the matters that, according to the "limited review" provision, could not be reviewed by the courts. This grant of jurisdiction to the BVA clearly did not extend to the review of VA regulations or policies. *See* 38 U.S.C. § 4004(c).

In 1970, the "limited review" provision was amended to its present form.[11] The legislative history of the 1970 amendment clearly indicates that this final alteration in the language of section 211(a) had one narrow purpose, to overrule a series of decisions by the Court of

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[11] The changes to the statute made in 1957 left untouched the relevant language of the 1940 amendment.

Appeals for the District of Columbia Circuit.[12] In those decisons,[13] the D.C. Circuit had determined that the phrase "a claim" encompassed only an original application for benefits. As a result the court held that subsequent action by the Administrator, such as a reduction or termination of benefits, was not an adjudication of a claim and hence was not precluded from review by section 211(a). In order to guarantee that *all* adjudications concerning individual benefits determinations remained immune from review, Congress eliminated the words "a claim" and substituted the present language of section 211(a). Congress did not intend to change the meaning of section 211(a) except to overrule the D.C. Circuit definition of "a claim." *Johnson v. Robison*, 415 U.S. at 371-73.

The statutory precursors to section 211(a) were intended solely to limit the judicial reviewability of individual benefits determinations. None of the "limited review" provisions expressly or implicitly included VA regulations or policies within their scope. Thus, the legislative history contains no evidence—let alone a clear and convincing indication—of congressional intent broadly to restrict judicial review.

In addition, since the enactment of section 211(a) in its present form, Congress has relied on an interpretation of the statute which allows judicial review of the validity of VA regulations.[14] Either the House or the

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[12] *See* H.R. Rep. No. 1166, 91st Cong., 2d Sess. 8-11, 19-24 (1970).

[13] *Tracy v. Gleason*, 379 F.2d 469 (D.C. Cir. 1967); *Thompson v. Gleason*, 317 F.2d 901 (D.C. Cir. 1962); *Wellman v. Whittier*, 259 F.2d 163 (D.C. Cir. 1958).

[14] The post-enactment Congressional consideration of section 211(a) is instructive, though not controlling, as to the intent of the enacting Congress. *See Universities Research Association v. Couto*, 450 U.S. 754, 778 (1981). The views of the later Congresses can indicate that the legislative body shared and acted upon a consensus regarding the meaning of a particular statute. *See, e.g., Grove City v. Bell*, 465 U.S. 555, 567-568 (1984); *Bell v. New Jersey*, 461 U.S.

Senate considered the scope of section 211(a) in each one of the last five Congresses.[15] Each congressional review of the "limited review" provision involved consideration of whether section 211(a) should be amended to authorize review of VA decisions concerning individual benefits claims. Throughout these hearings representatives of the Veterans' Administration have testified that section 211(a) does not preclude judicial review of the validity of regulations.[16] According to the VA's latest pronouncement, the VA "regards its regulations and substantive agency actions of broad application to be subject to ju-

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773, 784-87 (1983); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 668-72 (1980).

[15] *See, e.g., H.R. 585 and Other Bills Relating to Judicial Review of Veterans' Claims: Hearings Before the Committee on Veterans' Affairs, House of Representatives*, 99th Cong., 2d Sess.; *Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearings on S. 636 and Related Bills Before the Senate Veterans' Committee*, 98th Cong., 1st Sess.; *Judicial Review of Veterans' Claims: Hearings Before the House Veterans' Affairs Subcommittee on Oversight and Investigations*, 98th Cong., 1st Sess.; *Judicial Review of Veterans' Claims: Hearings Before the House Veterans' Affairs Subcommittee on Special Investigations*, 96th Cong., 2d Sess.; *Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearings Before the Senate Veterans' Affairs Committee*, 97th Cong., 1st Sess.; *Veterans' Administration Adjudication Procedures and Judicial Review Act: Hearings Before the Committee on Veterans' Affairs, United States Senate*, 96th Cong., 1st Sess.; *VA Administrative Procedure and Judicial Review Act: Hearings before the Committee on Veterans' Affairs, United States Senate*, 95th Cong., 1st Sess.

[16] From 1952 until the most recent hearings, the VA has testified that section 211(a) *does not* prohibit judicial review of all VA determinations. *See, e.g., Hearings on H.R. 360, 478, 2442 and 677 Before a Subcommittee of the House Committee on Veterans' Affairs*, 82d Cong., 2d Sess. 1962-63 (1952); *Veterans' Administration Procedure and Judicial Review Act: Report of the Senate Committee on Veterans' Affairs to Accompany S. 349*, 97th Cong. 2d Sess. 83 (1982) (statement of Donald Curtis, Acting Administrator).

dicial review. Accordingly, there are many instances in which section 211(a) . . . does not preclude judicial review at least with respect to these questions of law." [17]

Congress apparently has accepted this VA interpretation as persuasive as to the scope of section 211(a). Accordingly, the representations of the Veterans' Administration concerning the scope of section 211(a) must be accorded great weight. *See Lindahl v. Office of Personnel Management*, 470 U.S. 768, 788 (1985).

Similarly, Congress has acquiesced, from 1978 until today, in courts of appeals decisions such as *Wayne State* allowing judicial review of the validity of regulations. Such acquiescence suggests that these decisions were in keeping with congressional intent regarding the scope of section 211(a). Congress clearly would have been capable of responding to these judicial decisions if it believed that they thwarted its intentions regarding judicial review of VA determinations. In fact, it did so in 1970 because of its dissatisfaction with the District of Columbia Circuit's interpretation of the 1940 version of section 211(a), but it has not done so in the nine years that have elapsed since *Wayne State*.

C. The Purposes Served by Section 211(a) Require Only a Limited Preclusive Effect

The purposes served by precluding judicial review of VA decisions on individual benefits claims do not come into play when the validity of VA regulations or policies is at issue. In *Johnson v. Robison* this Court determined that Congress enacted section 211(a) to serve "two primary purposes: (1) to insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time consuming litigation; and (2) to insure that technical and complex determinations and applications of Veteran's Administration policy connected with veterans' benefits decisions will be

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[17] *1986 House Hearings*, Vol. II at 328.

adequately and uniformly made." 415 U.S. at 370. Judicial review of the validity of VA regulations and policies would not undermine either purpose. First, judicial review of such cases would not overload the courts. Permitting review of a statutory or administrative standard would not create a flood of litigation because the validity of a standard can be readily established, typically in a single litigation. *Bowen v. Michigan Academy*, 106 S. Ct. at 2141 n.11.

The nature of the regulatory challenge presented by petitioners Traynor and McKelvey is illustrative. Petitioners contend that the VA, like every other executive agency, must comply with the Rehabilitation Act of 1973, as amended. Should petitioners' challenge succeed in this Court, the VA's alcoholism policy would be invalidated. As a result threshold questions that arise in cases relating to educational benefits as well as pension and other benefits currently affected by the policy would be resolved without further resort to the courts.

The federal courts are well equipped to consider and summarily reject cases which are clothed as regulatory challenges but actually present appeals of individual benefit determinations. The courts have done just this in cases alleging constitutional challenges to veterans' benefits legislation. *See Rosen v. Walters*, 719 F.2d 1422, 1423 (9th Cir. 1983); *Pappanikolaou v. Adm. of Veterans' Administration*, 762 F.2d 8, 9 (2d Cir. 1985).

Past experience also suggests that a holding that VA regulations and policies are subject to review will not burden the courts.[18] From 1978, when the Sixth Circuit

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[18] This Court has addressed a similar concern in *Bowen v. Michigan Academy*. At issue in *Bowen* was whether the method by which Medicare benefits are determined—as opposed to the actual calculation of benefits—was subject to judicial review. The Court noted that it had not observed a flood of litigation in the past and doubted that there would be a future inundation. 106 S. Ct. at 2141 n.11.

decided in *Wayne State v. Cleland* that VA regulations were reviewable, until 1985 when the first cases reaching a contrary result were decided, only a handful of cases challenging VA regulations or policies has reached the courts of appeals. Congress achieved its goal of limiting the burden on the courts by denying review of VA decisions on individual benefits claims.

Second, allowing judicial review of the validity of regulations would not interfere with the uniformity of VA decision making concerning technical and complex determinations. In articulating this second purpose for section 211(a), this Court referred in *Johnson v. Robison* to a 1952 opinion of the VA Administrator that in the *adjudication* of compensation and pension claims a wide variety of medical, legal and other technical questions arise which require use of experts and which are not susceptible of legal standardization. 415 U.S. at 370 n.12. All of the technical and complex determinations listed by the Administrator in that letter, such as those involving length of service, origin of disability and rating schedules, arise in individual benefits claims and relate to factual findings which must be made by the VA.

In contrast, petitioners in this case do not request the Court to review any technical factual questions concerning their individual entitlement to benefits. Rather, petitioners request the Court to review the legality of VA action by determining whether a VA-promulgated policy violates another federal statute, the Rehabilitation Act. To the extent that the courts are required to assess technical or complex issues in passing on the validity of VA regulations or policies, such tasks are not beyond their competence or experience. Where necessary the courts may appropriately rely on the technical expertise of the VA by adopting a deferential standard of review that acknowledges the agency's expertise.

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There is no clear and convincing evidence to overcome the presumption that judicial review of Veterans' Admin-

istration regulations and policies is available under section 211(a). On the contrary, the language of the statute, its legislative history, and the purposes of the provision as identified by this Court all suggest that section 211(a) bars review only of VA decisions on individual claims for veterans benefits. To construe section 211(a) more broadly, as the Second Circuit did in *Traynor*, would be to contravene this Court's rulings concerning the availability of judicial review and to countenance the dangerous and irrational proposition that the Veterans' Administration is free to disregard the will of Congress.

CONCLUSION

For all of the foregoing reasons, Vietnam Veterans of America respectfully requests that this Court confirm that section 211(a) of the Veterans' Benefit Law does not preclude the judicial review of the validity of VA regulations and policies of broad application.

Respectfully submitted,

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